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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 378

LEO SHAFFER, JULES HORWICK AND EDGAR M. WYATT,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Leo Shaffer, Jules Horwick and Edgar M. Wyatt, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Southern District of Indiana, Terre Haute Division, was entered on September 10, 1959, and is not reported but appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith.

The Opinion of the United States Court of Appeals for the Seventh Circuit, affirming the said judgment, was filed June 13, 1961, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the record.

JURISDICTION.

On August 2, 1961, the Court of Appeals denied the Petition for Rehearing (this order appears in the Appendix of this Petition). This Petition is filed within thirty days of the denial of the said Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Where the Internal Revenue laws provide that a co-partnership engaged in the business of accepting wagers, doing business in one location, shall be required to pay but one special tax, and where the indictment charges the defendants with engaging in said business as co-partners of a wagering syndicate located at Terre Haute, Indiana, is not the Government required to prove the existence of the specific partnership charged in the indictment beyond a reasonable doubt?

2. Where the Internal Revenue Code of 1954 defines a partnership to include a syndicate, group, pool, joint venture or other unincorporated organization and that any number of persons doing business in co-partnership in any one place shall be required to pay but one special tax, and where the indictment charges that the defendants are engaged in the business of accepting wagers as co-partners in a wagering syndicate, is it not error for the court to instruct the jury that they may find *any* defendant individually guilty of the charges in the indictment, and

that any of the said defendants may be found guilty if he was an aider and abettor?

3. Where the regulations of the Commissioner of Internal Revenue provide that a partnership engaged in the business of accepting wagers shall file an application for a stamp tax, Form 11-C, and Excise Tax Returns, Form 730, with the Collector of Internal Revenue in the district in which its principal place of business is located, is it not error to introduce evidence that certain respective defendants comprising the partnership did not file the application or the returns in their respective cities of residence which were other than the location of the principal place of business of the partnership, and in Baltimore, Maryland?

4. Where the Government introduced testimony that certain respective defendants did not file the aforesaid Forms 11-C and 730 in their respective cities of residence, which were other than those within the District of Indianapolis, Indiana, and in Baltimore, Maryland, were not the jurors informed that the defendants committed other crimes with which they are not charged in the indictment in their respective cities of residence and in Baltimore, Maryland?

5. Whether the constant use of the phrase "and/or" in the instructions did not render them unintelligible and confusing to the jury.

6. Whether it was not error to permit Government witness Glen Johnson to answer hypothetical questions containing ultimate facts to be determined by the jury, and conclusions and facts not in evidence.

STATEMENT OF THE CASE.

The Petitioners were convicted, together with defendants Philip Share, Irwin Gordon, James Tamer, Joseph Jacobson and Charles L. Sumner, of violation of Title 18, U. S. C., Section 371, and of Title 26, U. S. C., Section 7201 and 7203, in a trial by the court and a jury, in the United States District Court, Southern District of Indiana, Terre Haute Division.

The jury found all of the defendants guilty as charged in the indictment (D. App. 15).* Each of the defendants was sentenced to serve a term of imprisonment of four years on Counts I, II, III and IV, to run concurrently and to serve a term of one year on Count V, to run consecutively with Counts I, II, III and IV; the sentences of the defendants Joseph Jacobson and Charles L. Sumner were suspended and they were placed on probation for five years. This Petition is filed by the defendants Leo Shaffer, Jules Horwick and Edgar M. Wyatt.

Count I charged that all the aforesaid defendants, on or about September 1, 1957, did feloniously conspire to wilfully attempt to evade and defeat a large part of the excise tax on wagers as provided for by Section 4401, Internal Revenue Code of 1954, for the months of September, October and November, 1957. It further alleged that the said defendants *engaged in the business of accepting wagers as co-partners in a wagering syndicate* at Terre Haute, Indiana. It charged that the object of the conspiracy was to be accomplished by concealing the existence of the said wagering syndicate and co-partnership; concealing the identities of the said co-partners; concealing

* Appellants filed a two volume Appendix and Appellee filed a three volume Additional Appendix and a book of exhibits. Petitioners, through this Petition refer to their Appendix as "D. App." and to the Government's Additional Appendix as "P. App."

the names of the persons placing wagers by destroying wagering slips; by maintaining false books and records with reference to the amount of the wagers; by engaging in the business of accepting wagers *as co-partners*, without first having paid the special Occupational Tax imposed by Section 4411; by failing to register with the District Director of Internal Revenue at Indianapolis as required by Section 4412 of the said Code; and by failing to file the Wagering Excise Return to the said officer "or to any *other proper* officer of the United States," *and by failing to pay the Wagering Excise Tax due for the months of September, October and November, 1957* (D. App. 23).

Fifteen overt acts were alleged for the purpose of carrying the said conspiracy into effect.

Count II charged that during September, 1957, the aforesaid defendants were engaged in the business of accepting wagers as co-partners in a wagering syndicate located at Terre Haute, Indiana and that during said month the defendants accepted wagers in the amount of $326,315.20, more or less subject to a 10% excise tax; that the defendants *as co-partners* owed an excise tax in the amount of $32,631.52, more or less; that *as co-partners* the defendants were required by law to file a return with the District Director of Internal Revenue at Indianapolis, Indiana, and to pay the said excise tax; that they did wilfully attempt to evade and defeat the said excise tax due on October 31, 1957 by failing to file a wagering excise tax with the said District Director or to any other *proper* officer of the United States; and by failing to pay the said District Director or any other proper officer of the United States the excise tax due; and by concealing and misleading all *proper* officers of the United States as to the correct amount of wagers during September, 1957; and by concealing the existence of their wagering business; and by concealing the identities of the said co-partners;

and by maintaining false books and records of the taxable wagers received by the defendants; and by destroying wagering slips indicating the identities of persons placing wagers of the said wagering syndicate and the gross amount of such wagers (D. App. 23-24).

Counts III and IV charge identical violations pertaining to wagers accepted in November and December 1957 totalling $1,305,260.80 and $1,631,576.00 respectively. Count V charges that the defendants were engaged in the business of accepting wagers as co-partners of a wagering syndicate during the aforementioned period and that they violated 26 U. S. C. A. § 7203 by wilfully and knowingly failing to register as required by Section 4412 of the Internal Revenue Code of 1954 (D. App. 25-28).

The defendants, including the Petitioners, moved for an indefinite continuance because of alleged and prejudicial newspaper and television publicity (D. App. 87-90) and also to transfer the proceedings to another district, incorporating by reference in the latter motion all that the defendants set forth in the motion for an indefinite continuance (D. App. 90).

EVIDENCE.

Internal Revenue Agents Homer H. Forrester, at Reno, Nevada (D. App. 257-260), John A. Wheeler, at Chicago, Illinois (D. App. 260-263), Anthony Stapke, at Los Angeles (D. App. 262-263), Imogene Barlow, at Detroit (D. App. 264-265), and Joseph J. Marchioni at Baltimore, testified (D. App. 266-267) that Irwin Gordon and Philip Share did not file Registry-Wagering Form 11-C and Form 30 in the office of the Internal Revenue Service in Reno, Nevada; that neither Shaffer nor Jules Horwick filed similar documents in the District Director's office at Chicago, Illinois; that Philip Share did not file similar documents at the

office of the District Director of Internal Revenue at Los Angeles; that James Tamer did not file these documents in the office of the Internal Revenue Service in Detroit; and that none of the said defendants filed any of these documents, respectively, in the office of the Internal Revenue Service in Baltimore.

Delbert Paul Hopkins, the Assistant Chief of the Collection Division of Internal Revenue Service located at Indianapolis, Indiana, over objection, testified that he found no records in his office that Leo Shaffer had filed an Application for Registry-Wagering, Form 11-C (D. App. 221); that defendant Jules Horwick did not file a similar application (D. App. 221), nor did defendant James Tamer (D. App. 222), nor did defendant Joseph Jacobson (D. App. 222), nor did defendant Charles L. Summer (D. App. 222-223), nor did defendant Irwin Gordon (D. App. 226), nor did defendant Philip Share (D. App. 223). He further testified that the records in his office indicated that the said defendants did not file a monthly Wagering Excise Tax Return, Form 730, for the months of September, October and November, 1957 (D. App. 223-232). E. M. Wyatt and Company and Wyatt Service Company, neither of which firms was indicted, did not file Form 11-C nor 730 (D. App. 234-235). There was no record that Wyatt & Shaffer filed an application for Registry-Wagering, nor any wagering tax returns (D. App. 235-236).

Defendant E. M. Wyatt, however, filed Form 11-C, the Application for Registry-Wagering, for the period of September 12, to June 30, 1958, in the office of the District Director at Indianapolis, Indiana (D. App. 238). He also filed Form 730 for the months of September 1957, October 1957 and November 1957—Government's Exhibits 2, 3 and 4 (Book of Exhibits).

There was no testimony or evidence that the defendants, Leo Shaffer, Jules Horwick, Philip Share, Irwin Gordon,

Joseph Jacobson, James Tamer, Charles L. Sumner and Edgar M. Wyatt, as co-partners in a wagering syndicate at Terre Haute, Indiana, as charged in the indictment, failed to file the aforesaid forms 11-C and 730 in the office of the Internal Revenue Service located at Indianapolis, Indiana.

Government witnesses testified that defendant Wyatt leased third floor premises at 671½ Wabash Avenue, Terre Haute, Indiana, from Joseph Traum, the owenr of a residence at 673 Wabash Avenue, at a rent of $1,000.00 for the period of September 1, 1957 to December 31, 1957 (D. App. 396-401). Wyatt told Traum that he wanted to rent this space to put in a sports service (D. App. 403-404). Wyatt applied on September 9, 1957, to the Western Union Telegraph office in Terre Haute for sports service (D. App. 407), and this service was installed at 671½ Wabash Avenue.

Wyatt applied for telephone service for the premises (D. App. 314-321) and deposited $5,000.00 for the guarantee of payment of charges, to cover long distance calls (D. App. 321-322).

Wyatt reserved rooms at a Terre Haute hotel for Shaffer and Jacobson (D. App. 366, 375) and they registered at such hotel on September 13, 1957. On the same date Horwick and Tamer registered in Terre Haute hotels (D. App. 376, 371-373, 375, 389).

Government witness Kaplan, a resident of Chicago, Illinois, testified that he sold sports service, which was the making of handicaps or betting odds on sports events (D. App. 1149).

Shaffer arranged for this sports service (D. App. 1160) to be sent to sixty-two clients of defendant Shaffer, two sheets weekly, by mail. He always had that list of Shaffer's clients. These mailings were made from Address-O-Graph

machine plates (D. App. 1163) and they were returned to someone on or about December 1, 1957 (D. App. 1164). Mr. Kaplan couldn't remember whether this someone else was Mr. Shaffer, but it could have been he. This testimony, by order of court, was confined only to Mr. Shaffer (D. App. 1156). He was paid for this service by the check of Wyatt & Company (D. App. 1169).

Defendant Horwick ordered about 110 sheets per week. His office addressed the envelopes and would insert the information therein; they were picked up by Mr. Horwick's man in Kaplan's office in Chicago (D. App. 1172-1173). Shaffer and Horwick were the only two defendants who purchased this service. Kaplan furnished service to them for a long time prior to September, 1957.

Mail was received from customers at 671½ Wabash Avenue (D. App. 450-451) and at the Manor House Restaurant (D. App. 537-542). The letters indicated that the forwarded money enclosed therein was to go to either Shaffer or Horwick (D. App. 938-984). Wyatt and Shaffer paid the porter (D. App. 561-562, 565-566).

A large number of witnesses testified that they placed bets over the telephone located at 671½ Wabash Avenue.

R. B. Key (D. App. 848-850), Samuel A. Fenberg (D. App. 901-906), David Shaer (D. App. 915-922), Joseph Fleischer (D. App. 923-928), Henry De Jong (D. App. 928-932), James Star (D. App. 940-942), Edward Thornwell (D. App. 944-945), Sam Beil (D. App. 967-970), Ned Blaz (D. App. 986-988), Aleck Ostrow (D. App. 988-991), Gordon Scherck (D. App. 922-996), Gene Purdy (D. App. 1000-1002), Sam K. Viersen, Jr. (D. App. 1003-1009), Paul Warren (D. App. 1013-1014), Tim Shaner (D. App. 1016-1017), Isadore Shapiro (D. App. 1018-1025), George Polo (D. App. 1032-1038), Irving Pasternak (D. App. 1041-1043), C. H. Dresser (D. App. 1053-1057), Gerard F. Re (D. App. 1068-1074), Ben-

jamin McKeage (D. App. 1080-1083), B. H. Kean (D. App. 1116), Fannie Zorensky (D. App. 1118-1122), A. Ben Chadwell (D. App. 1141-1146), Joseph Vinocur (D. App. 1206-1209), Sol Lippman (D. App. 1209-1211), F. William Harder (D. App. 1235-1237), Jack Leonard (D. App. 1247-1248), John R. Crawford (D. App. 1276-1277), and Irving Weisman (D. App. 1277-1278), all testified that they made bets with the Defendant Horwick, either by that name or by the name of Jules or Julie. In almost each instance they testified that they expected to be paid by Horwick and no one else in the event they won bets and that they expected to pay Horwick and no one else in the event they lost bets.

John H. Judd (D. App. 850-855), Neville Alfrey (D. App. 937-940), Harry Joseph (D. App. 970-972), Beldon A. Kattleman (D. App. 972-975), Arthur Summerfeld (D. App. 976-980), K. Barney Levine (D. App. 980-986), John Joseph (D. App. 1014-1016), William Hecht (D. App. 1029-1032), Sherman Sharwell (D. App. 1046-1052), David Gensburg (D. App. 1129-1140), Walter Gray (D. App. 1147-1148), Sam Rodder (D. App. 1186-1190), Frank Scoby (D. App. 1192-1196) and C. C. Parker (D. App. 1197-1204) all testified that they made wagers with the Defendant Leo Shaffer. In almost each instance the witness testified that if he won a bet he expected to be paid by Shaffer and if he lost he expected to pay Shaffer.

Zeppo Marx (D. App. 863-868), testified he made bets with Philip Share.

Theodore Wender (D. App. 868-874) testified that he made bets with either Philip Share or Jules (Horwick).

Michael Shapiro (D. App. 1123-1125) testified that on a few occasions he made a bet with Mr. Share; and Sam Segal (D. App. 1125-1129) testified that he asked for Mr. Share but never got to talk to him; he therefore made wagers with someone he didn't know.

Julius Gaines (D. App. 840-847) testified that he made bets with "Flippy" Share or Leo Shaffer. Max Stein also testified that he made wagers with "Flippy" Share or Leo Shaffer (D. App. 874-875).

Jack Lieberman (D. App. 912-915) didn't know the name of the person with whom he made a wager. Earl A. Jeffors (D. App. 855-860) didn't know the name of the person with whom he bet; and neither did John C. Tyler (D. App. 942-944).

Julius Fischman (D. App. 1010-1012) only did business with someone whom he knew as "Frank".

A Government witness, Glen Johnson, was asked a number of hypothetical questions for the purpose of determining the total tax due by the co-partners and in a number of questions asked for that purpose he was requested to assume that the amounts in Government's Exhibit 137 represent *amounts due to the defendants as co-partners of a wagering syndicate* from various bettors (D. App. 1289, 1292, 1296-1297, 1299, 1302, 1303-1304, 1308, 1309-1310). Objections were made to the questions (D. App. 1290, 1294-1295, 1300, 1302-1304, 1309-1311). These objections were overruled (D. App. 1291, 1296, 1300, 1302-1304, 1309-1311).

Mr. Johnson answered that the total amounts receivable or due the defendants as co-partners for September, October and November, 1957, was $116,212.00 (D. App. 1292-1293). The total amount of gross wagers accepted by the defendants as co-partners on football games played November 29, 1957 (D. App. 1294), was $327,760.00 (D. App. 1296). The total amount of wagers accepted by the defendants as co-partners on football games *that were not played* as of November 29, 1957 (D. App. 1297) was $930,777.00 (D. App. 1298). The total amount of gross wagers received by the defendants as co-partners on the post season ball games *to be played* on January 1, 1958, but received prior

to November 29, 1957 (D. App. 1299), was $136,100.00 (D. App. 1302). The total amount of wagers with the defendants as co-partners in September, October and November of 1957 (D. App. 1303) was $2,895,231.00 (D. App. 1305). The total amount of wagers accepted for Thursday, November 28, 1957 was $355,525.00 (D. App. 1309). The wagers accepted for games played on November 30, 1957, and December 1, 1957, was $636,400.00 (D. App. 1309-1310). For Sunday, December 1, 1957, the total was $145,600.00 (D. App. 1310-1311). The total amount of wagers was $1,844,707.00 accepted by the co-partners on the assumptions appearing in the questions put to the witness Glen Johnson that the defendants were co-partners in a wagering syndicate.

Handwriting experts placed upon the stand by the Government testified that 31 of the wagering tickets found on the premises at 671½ Wabash Avenue were in the handwriting of Irwin Gordon (D. App. 1339-1340, 1383-1384); that 96 were in the handwriting of Charles L. Sumner (D. App. 1345-1348, 1386-1387); that 3 were in the handwriting of Joseph Jacobson (D. App. 1350, 1387-1388); that 10 were in the handwriting of James Tamer (D. App. 1353-1355, 1384); that 26 were in the handwriting of Edgar M. Wyatt (D. App. 1368-1369, 1390-1391); that 111 were in the handwriting of Jules Horwick (D. App. 1357-1358, 1389-1390); that 85 were in the handwriting of Philip Share (D. App. 1360-1361, 1385); and that 166 were in the handwriting of Leo Shaffer (D. App. 1364-1366, 1392-1393).

The trial commenced on June 22, 1959. Two days prior thereto, newspapers and television comments recited that the defendants had been convicted of crimes and had been indicted for serious crimes and that most of them were ex-convicts. Commenting on this publicity, the Court of Appeals observed: "There is no question but what the material circulated through the press and other communication media contained statements prejudicial to the defendants,

characterizing some as professional gamblers, others as ex-convicts, and containing representations of prior criminal activities and convictions." Prior to trial the defendants moved for a continuance thereof and for a transfer of the trial to another venue (D. App. 87-90). The Court denied the motions (D. App. 108-112).

The Court conducted an extended examination of the prospective jurors (D. App. 115-211). The defendants Philip Share, Irwin Gordon and James Tamer are also filing a Petition for Writ of Certiorari with this Honorable Court and have gone into lengthy detail regarding the interrogation of prospective jurors by the Court and the selection of jurors, and therefore these details are not recited here, in the interest of brevity and saving the time of this Court. It appears, however, that the examination of each juror was had in the presence of the remaining jurors; they were not examined separately out of the hearing of other jurors.

The Court instructed the jury at extreme length. There was a total of forty-eight instructions, and they appear in 104 pages of the Defendants' Appendix (D. App. 1453-1558). The instructions to the jury permitted the jurors to find any two or more of the defendants guilty, and also to find any defendant guilty if the evidence showed him to be an aider and abettor. An exception was made to the instructions as a whole because it was stated that in order to convict, the Government must prove that all of the defendants were co-partners and that there must be eight co-partners, and it is improper to allow a conviction of less than eight partners (D. App. 1561). Exceptions were also made (D. App. 1561-1562) to the Court's refusal to give defendants' tendered instructions 48 (P. App. 2048), 49 (P. App. 2049), 54 (P. App. 2053), 51 to 71 (P. App. 2050-2061), 76 (P. App. 2062), 81 (P. App. 2063), 82 (P. App. 2063), 83 (P. App. 2064), 84 (P. App. 2064), 87 (P. App. 2064), 92 through 94 (P. App. 2066), 95 (P. App. 2067), 96 (P. App. 2068) and 97 (P. App. 2068-2069).

STATUTES AND REGULATIONS INVOLVED.

Section 7203, Internal Revenue Code, 1954:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (*other than a return required under authority of section 6015 or section 6016*), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Section 7701 of Internal Revenue Code, 1954:

> "(a) When used in this title, * * * —
>
> (1) Person.—The term 'person' shall be construed to mean and include an individual, * * *, partnership, association, company * * *.
>
> (2) Partnership and partner.—The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, * * * and the term 'partner' includes a member in such syndicate, group, pool, joint venture, or organization."

Section 4401 of Internal Revenue Code, 1954:

> "(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 per cent of the amount thereof."

Section 4411 of Internal Revenue Code, 1954:

> "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

Section 4412 of Internal Revenue Code of 1954, Registration. (26 United States Code, Section 4412.)

"(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

"(1) his name and place of residence;"

Section 4901 of Internal Revenue Code, 1954:

"(a) Condition precedent to carrying on certain business.—

"No person shall be engaged in or carry on any * * * business subject to the tax imposed by section 4411 (wagering), * * * until he has paid the special tax therefor.

"(b) Computation.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any * * * business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following."

Section 4902 of Internal Revenue Code, 1954, Liability of Partners.

"Any number of persons doing business in copartnership at any one place shall be required to pay but one special tax."

Section 7272, Internal Revenue Code, 1954:

"In general.—Any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50."

Section 371, Title 18, U. S. C.:

§ 371. Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud

the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Section 2, Title 18, U. S. C.:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

Regulation Section 325.55 Partnership Liability:

"Any number of persons doing business in *copartnership shall be required to pay but one special tax.* The collector may issue a special tax stamp to a copartnership in a firm or trade name, provided the names and addresses of all members of the partnership are disclosed on Form 11-C, Special Tax Return."

Regulation Section 325.30 Return:

"(a) Every person required to pay the tax on wagers imposed by * * * the Code shall prepare each month from the daily records required by section 325.32 a return, in duplicate, on Form 730 in accordance with the instructions thereon. The original return, together with the amount of the tax, shall be filed with the collector of internal revenue *for the district in which is located the office or principal place of business of the person required to make the return.* If such person resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of

internal revenue for the district in which he resides. If such person has no office, residence, or principal place of business in the United States, the return shall be filed with the collector at Baltimore, Md. The return shall be filed on or before the last day of the month following that for which it is made."

Regulation Section 325.50 Registry, Return, and Payment of Tax:

"(a) Every person engaging in the business of accepting wagers and liable to the 10 per cent excise tax imposed by * * * the Internal Revenue Code (* * *) and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11-C. The return shall be filed with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Baltimore, Md. The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein.

"(b) * * *.

"(c) Each return shall show the taxpayer's full name. A person doing business under an alias, style, or trade name shall give his true name, followed by his alias, style, or trade name. In the case of a partnership, association, firm, or company, other than a corporation, the style or trade name shall be given, also the true name of each member and his place of residence. * * *."

REASONS FOR GRANTING WRIT.

1.

Each of the counts charged that the petitioners, Leo Shaffer, Jules Horwick and Edgar M. Wyatt, together with five other defendants, Philip Share, Irwin Gordon, James Tamer, Joseph Jacobson and Charles L. Sumner, were engaged in the business of accepting wagers *as co-partners* in a wagering syndicate at Terre Haute, Indiana. Count I charged a conspiracy. Counts II, III and IV charged substantive crimes of accepting wagers as co-partners, of owing an Excise Tax as co-partners. Count V charged that the defendants, as *co-partners* of a wagering syndicate, failed to pay the special tax imposed under Section 4411 of the Internal Revenue Code, and that they failed to file an Application for Registry-Wagering, pursuant to Section 4412.

Section 4421, in so far as it applies to this case, states that the term "wager" means:

> "A. any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers."

Section 4411 of the Internal Revenue Code of 1954 provides:

> "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

Section 4412 of the Internal Revenue Code of 1954 provides that each person required to pay a special tax shall register with the official in charge of the Internal Revenue District (1) his name and place of residence; also the name and place of residence of each person who is engaged in

receiving wagers for or on behalf of any person liable for tax under subchapter A. Subsection (b) provides:

> "Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered."

Count V charged the facts alleged to have violated Section 7203 of the said Internal Revenue Code. This section provides that whoever is guilty of the crime or crimes alleged in Count V shall be guilty of a misdemeanor and shall be fined not more than $10,000.00 or imprisoned not more than one year, or both, together with the costs of prosecution.

The several charges in the indictment described the defendants as co-partners in a wagering syndicate, as authorized by the Internal Revenue Code of 1954, and the Regulations of the Commissioner of Internal Revenue.

Section 4902 of the Internal Revenue Code provides that "any number of persons doing business in co-partnership in any one place shall be required to pay but one special tax."

Section 7701 of the Internal Revenue Code defining words used in Title 26, U. S. C., provides:

> "(1) Person.—The term 'person' shall be construed to mean and include an individual, * * *, partnership, association, company * * *.
>
> "(2) Partnership and partner.—The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, * * * and the term 'partner' includes a member in such syndicate, group, pool, joint venture, or organization."

Regulation Section 325.55 provides:

> "Any number of persons doing business in co-partnership shall be required to pay but one special tax. The collector may issue a special tax stamp to a co-partnership in a firm or trade name, provided the names and addresses of all members of the partnership are disclosed on Form 11-C, Special Tax Return."

It was incumbent upon the Government to prove beyond a reasonable doubt that all of the defendants named in the indictment committed the several offenses charged *as co-partners* of a wagering syndicate, and not as persons accepting wagers *individually* or for his own respective account.

The Government failed to prove that the defendants conspired with each other, as co-partners, to commit the offense in Count I. They failed to prove the defendants committed the crimes, as co-partners, charged in Counts II, III, IV and V.

There was absolutely no proof that the partnership entity, as distinguished from the individual members thereof, failed to file an Application for Registry-Wagering, or that the partnership entity, as distinguished from the individual members thereof, failed to file Excise Tax Returns, Form 730, or that the partnership entity, as distinguished from the individual members, failed to pay any Excise Taxes.

The Government introduced testimony that none of the defendants *individually* had filed an Application for Registry-Wagering, Form 11-C (D. App. 221-223), and that none of them *individually* filed the monthly wagering Excise Tax Returns, Form 730 (D. App. 223-232) in the Internal Revenue office located at Indianapolis, Indiana. There was testimony that neither E. M. Wyatt Company nor Wyatt Service Company filed the said forms (D. App. 234-235), nor that Wyatt & Shaffer filed those forms (D. App. 235-236).

Revenue Agent Hopkins produced Exhibits 1, 2, 3, 4 and 4(a), all with respect to E. M. Wyatt. Exhibit 1 was an Application for Registry-Wagering for the period of September 12 to June 30, 1958, signed by E. M. Wyatt, and filed in the Office of the District Director at Indianapolis, Indiana. Exhibits 2, 3 and 4 were returns by Mr. Wyatt, respectively for the months of September, October and November, 1957 (D. App. 238-240).

Government Agent McCann asked Wyatt, with respect to his Application for a Registry-Wagering, whether he intended to have partners and Wyatt said "No." He signed his Application as "Owner" (D. App. 304) and Exhibits 2 and 3, monthly wagering tax returns for September and November of 1957 were signed by him as "E. M. Wyatt, Owner" (D. App. 308).

There is nothing in all of the evidence and testimony introduced by the Government to show that E. M. Wyatt was not the owner of his wagering business. There is nothing in the same evidence or testimony to show that he was a partner of any of the defendants in this case.

His elimination as a partner destroys the Government's allegations that the eight defendants named in the indictment, and each count thereof, were co-partners.

The Court of Appeals, in commenting on whether the Government proved a partnership, stated:

> "More than fifty witnesses testified to placing bets by telephone on calls to the two unlisted numbers assigned to the telephones. Some asked for one of the individual defendants when they called, others placed their bets with whoever answered the phone or with someone to whom the defendant called transferred the call. In a number of instances bettors who had lost were instructed to remit the cash by registered mail to E. M. Wyatt or E. M. Wyatt & Company although they knew neither and had placed their bet with one of the defendants other than Wyatt. One

> bettor on inquiring whether he was betting with defendant Shaffer was informed 'Yes, with his company.'" (P. 52, this Petition.)

Of course, the bettor's comment that he was betting with Shaffer's company can in no way bind any of the defendants. The Court of Appeals noted (P. 53, 54, this Petition):

> "On September 12, 1957 Wyatt filed a special tax return and application for registry-wagering at 671½ Wabash Avenue listing himself as the owner and stating he was in the business of accepting wagers on his own account. He filed monthly excise tax returns for the months of September, October and November, 1957. They were signed 'E. M. Wyatt, owner' and in the aggregate covered the tax due on wagers in the amount of $5625.00."

And it continued further as follows (P. 54, this Petition):

> "We have not attempted to set forth the evidence in detail but from a careful study of the record we are convinced that there was ample and substantial basis for the jury to conclude that the defendants conspired to utilize the registration and the monthly tax returns of Wyatt as a front to mask the magnitude of the wagering operation they actually conducted with the plan and design of evading the substantial tax actually due. The defendants' contention that the evidence does not support a conclusion that the operation conducted at 671½ Wabash Avenue was a partnership or syndicate operation is without merit."

The conclusion of the court that the defendants conspired to utilize the registration and monthly tax returns of Wyatt as a front to mask the wagering operation actually conducted by them, with the design of evading the substantial tax actually due, strengthens the petitioners' position that Wyatt was not a member of a specific partnership described in the indictment.

The Government introduced a summary of wagers ap-

pearing on its Exhibit 136 (P. App. 2225-2238), identified in the handwriting of six defendants, Gordon, Tamer, Horwick, Share, Shaffer and Wyatt, based on the testimony of Government witnesses Glen Johnson, Howard Doulder and Edwin Schroeder, indicating *individual* wagers taken by them, respectively. At page 2238 of Plaintiff's appendix are the individual totals of the bets taken by each of the said defendants, and a total of all of them.

The defendants did not hold themselves out as partners. Their association with each other in restaurants or at hotels is no indicia of a partnership. None of the elements of a partnership was introduced by the Government, that of sharing in the profits or in the losses. This was recognized by the trial court in its instruction (D. App. 1496) "An employee or an agent of the alleged partnership does not assume the risk of profit and/or loss of the partners. A partnership under the Internal Revenue Act of 1954 is a separate person or entity from the partners or persons who constitute the partnership for the purpose of the wagering law." Again, the trial court instructed the jury that the partners assumed the risk of profit or loss, as principals (D. App. 1494).

There was some doubt in the mind of the trial judge as to whether there was a partnership because he inaccurately instructed the jurors that *each* of the defendants is charged with the several counts in the indictment (D. App. 1515, 1516, 1517, 1518, 1520), whereas the actual fact is that *all* of the defendants were indicted as co-partners of a wagering syndicate, an entity recognized and authorized by the Internal Revenue laws and its regulations.

There was a complete failure of proof, or at least a fatal variance, of the allegations that the defendants, as co-partners in a wagering syndicate, committed the crimes charged in the indictment. *Stirone* v. *United States,* 361 U. S. 212, 215-218.

2.

The court gave the following Instruction No. 35 to the jury (D. App. 1540-1543):

"In all Five (5) Counts of the Indictment, the defendants are alleged to have been partners in a wagering business. I have defined partners elsewhere in these instructions. The United States must prove by direct or circumstantial evidence that the defendants were partners, irrespective of the quantity of their shares in the partnership, if it does not prove beyond a reasonable doubt that defendants were partners you must acquit such defendant or defendants of all Five (5) Counts of the Indictment, providing such defendants were not aiders or abettors as defined elsewhere in Instruction No. 41. This is so because a non-partner under Counts One (1), Two (2), Three (3), and Four (4) would not be obligated for the monthly wagering excise tax on accepted wagers of the partnership wagering business, nor is such non-partner obligated to register as a member of the partnership as charged in Count Five (5) of the Indictment unless such non-partner was an employee receiving wagers for the partnership and this is explained in the other instructions. However, you may find that such non-partner may be guilty of all Counts of the Indictment if he were an aider or abettor as defined elsewhere under these instructions.

"Also, I instruct you that even if you find all of the defendants were all partners in the business as alleged in all Counts of the Indictment you must determine from the evidence beyond a reasonable doubt that each of them are guilty of the essential elements and facts of such Counts of the Indictment under the law as explained in all of these instructions. However, this does mean that each partner did himself perform all of the various acts charged in the Indictment for he would be guilty if he willfully and knowingly instigated, or caused, or assented that the acts be done by the other partners, agents, or employees of the partners but such partner must have done so knowingly and willfully with a specific intent himself, to violate the laws al-

leged in the Indictment. Even though you find all defendants were partners, it would be possible, if the evidence and under the law given you in these instructions so warrants, for one or more of the partners to be not guilty of the offenses charged even though other partners be guilty of the offenses charged in the Indictment.

"If you find that a defendant or defendants engaged in the business of accepting wagers individually and not as partners, then the United States has not proved there was a partnership as to such defendant or defendants and you should acquit such defendant or defendants of all Counts of the Indictment. If you find that a defendant or defendants engaged in the business of accepting wagers individually, independently and separate from the other defendant or defendants without any conspiracy agreement between them as charged in Count One of the Indictment, then you should acquit such defendant or defendants. However, you may find that such defendant or defendants may be guilty of all Counts of the Indictment if he or they were aiders or abettors as defined elsewhere under these instructions.

"If you find that there were two or more partnerships engaging in the business of accepting wagers at 671½ Wabash Avenue, Terre Haute, State of Indiana, during the time or times in question, you must determine from the evidence beyond a reasonable doubt whether or not the specific partnership as charged in Count One (1), and the specific partnership as charged in Count Two (2), and the specific partnership as charged in Count Three (3), and the specific partnership as charged in Count Four (4), and the specific partnership as charged in Count Five (5) of the Indictment has or have been proved. If the specific partnership of two or more of the defendants as charged in the several Counts of the Indictment have not been proved, you should acquit the defendant or defendants even though you find partnerships other than the partnership charged in the several Counts of the Indictment. The defendants, at least two or more, must be

members of the specific partnership charged in the several Counts of the Indictment and their membership in another partnership will not warrant their conviction of the charged partnership in the several Counts of the Indictment. If you find part of the defendants were members of a partnership and the other defendants were members of another partnership and both were guilty of the identical essential elements and facts of the crimes as alleged in Counts One (1), and or Two (2), and/or Three (3), and or Four (4), and or Five (5) of the Indictment and you further find that the crime and/or crimes charged in Counts One (1), and or Two (2), and/or Three (3), and or Four (4), and or Five (5) of the Indictment has or have not been proved beyond a reasonable doubt then you should acquit the defendants of such Count and/or Counts that have not been proved for the reason that you cannot under the charges find part of the defendants guilty of the partnership crime or crimes and the other defendants guilty of the other partnership crime or crimes in one verdict on a Count of the Indictment charging only one specific partnership. However, if you find that the specific partnership of two or more of the defendants charged in a Count of the Indictment existed beyond a reasonable doubt in addition to other partnerships, you must determine the guilt or innocence of the defendants in the charged partnership."

The Court also gave its Instruction No. 36 (D. App. 1543-1544):

"If you find any of the defendants were not partners and you find from the evidence beyond a reasonable doubt that such defendant was merely an employee of the alleged partnership in question and did or did not receive wagers for such partnership, you must acquit such defendant of all Five (5) Counts of the Indictment; providing such employee was not an aider or abettor as defined in Instruction No. 41. This is so because a mere employee who did or did not receive wagers for the partnership was not obligated for the monthly wagering excise tax on accepted wagers of

the partnership wagering business, this was the partners' obligation not the employee, nor is such employee obligated to register for the partnership and pay the yearly occupational tax for the partnership because he was not a member of the partnership and this was the duty of the partnership.

"Also, I instruct you that even if you find one or more of the defendants were employees of the alleged partnership and receiving or not receiving wagers in behalf of such partnership it would be possible, if the evidence and under the law given you in these instructions so warrants, for such employee defendant to be guilty of the offenses charged if he were an aider and abettor as defined elsewhere under these instructions."

These confusing and lengthy Instructions contain prejudicial and repugnant statements to the jury. It requires them, correctly, to acquit the defendants if they find they were not partners, but adds "provided that the defendants were not aiders and abettors." This latter statement in itself contains a glaring repugnancy because if the defendants are partners they are the principals and cannot be aiders and abettors to themselves. *United States* v. *Horton*, 7 Cir., 180 F. 2d 427, 431.

In other portions of the foregoing Instruction the Court permits the jury to depart from the charge in the five Counts of the Indictment that the defendants were partners and departs from a correct Instruction and permits the jury to find two or more defendants guilty if they are members of a partnership. It is obvious that this incorrect portion of the Instruction permits the jury to find certain defendants guilty of operating a partnership different from the one charged in the Indictment. Certainly this single sentence in the Instruction: "Even though you find all defendants were partners, it would be possible, if the evidence and under the law given you in these instructions so warrants, for one or more of the partners to be not guilty of the offenses charged even though other partners be guilty

of the offenses charged in the Indictment." contains in itself a serious repugnancy and a confusing statement.

Another portion of the Instruction contains a correct statement:

> "If you find that a defendant or defendants engaged in the business of accepting wagers individually and not as partners, then the United States has not proved that there was a partnership."

As to such defendant or defendants this paragraph of the Instruction concludes:

> "However, you may find that such defendant or defendants may be guilty of all counts of the Indictment if he or they were aiders or abettors."

Here again it is manifest that if a defendant was engaged in the business of accepting wagers individually and not as a partner, he could not be an aider and abettor because if he were an aider and abettor he could not be engaged in the business of accepting wagers individually. He could not aid and abet himself.

A reading of the entire Instruction shows other repugnancies. The giving of such instructions is prejudicial and reversible error.

These last named instructions were not accurate since *each* of the eight defendants was not charged with the various crimes set forth in the indictment. All of the defendants were charged as an entity, a co-partnership in a wagering syndicate.

Instructions 28 and 29 are certainly repugnant to the first part of Instruction No. 35, in which the jury is advised that the defendants are charged to be partners in a wagering business and that if the Government does not prove beyond a reasonable doubt that the defendants are partners you must acquit *each* defendant or defendants of all five Counts of the Indictment (D. App. 1540). This

is a correct instruction since it accurately recites the charges in each Count of the Indictment that the defendants were engaged in the business of accepting wagers as co-partners of a wagering syndicate (D. App. 19; 23; 25; 26; 28).

It is difficult to understand the *meaning* of some of the instructions read to the jury. For example, Instruction No. 33 (D. App. 1537) concludes as follows:

> "If you find from the evidence beyond a reasonable doubt that any defendant or defendants committed the alleged offenses in Counts Two (2) *and/or* Three (3), *and or* Four (4), *and/or* (5) *and/or any other criminal offense* and you further find that the United States *has not proved* beyond a reasonable doubt that two or more of such defendants *did not conspire* as alleged in Count One (1) to commit the substantive offenses of wilful attempt to evade and defeat the wagering excise tax in one or more of the tax periods of September, and or October, and or November, 1957, as alleged in Count One (1) of the Indictment, then you must acquit that defendant or defendants of Count One (1)" (D. App. 1538) (Italics supplied).

Why the trial court inserted a phrase that the jury might find beyond a reasonable doubt that any defendant or defendants committed "any other criminal offense" is unfathomable, particularly since a necessary *verb* is omitted. The sense of the remaining part of the instruction becomes clouded by the use of a double negative stating that if the jury find that the United States *has not proved* that two or more of the defendants *did not conspire* as alleged in Count One (1), then you must acquit that defendant or defendants of Count One.

Again, in a long Instruction, No. 30, with respect to the conspiracy count, the Court charged the jury (D. App. 1529):

> "If you find that there were two or more conspiracies,

you must determine from the evidence beyond a reasonable doubt whether or not the specific conspiracy, of on or about September 1, 1957, as charged in Count One (1) of the Indictment has been proved. If the specific conspiracy as charged in Count One (1) has not been proved you should acquit the defendants even though you find conspiracies other than that charged in Count One (1) of the Indictment. Two or more of the defendants must be members of the specific charged conspiracy in Count One (1) and their membership in another conspiracy will not warrant their conviction of the charged conspiracy in Count One (1). If you find part of the defendants were members of a conspiracy and the other defendants were members of another conspiracy and both of which conspiracies had the identical essential elements and facts of the conspiracy as alleged in Count One (1) of the Indictment and you further find that the specific conspiracy of two or more of the defendants as charged in Count One (1) has not been proved beyond a reasonable doubt, then you should acquit the defendants for the reason that you cannot under the charges of Count One ~~(1)~~ find part of the defendants guilty of one conspiracy and the other defendants guilty of the second conspiracy in *one verdict* on Count One (1) of the Indictment. However, if you find that the specific conspiracy of on or about September 1, 1957, charged in Count One (1) existed beyond a reasonable doubt in addition to the other identical conspiracy, you must determine the guilt or innocence of the defendants in the charged conspiracy" (Italics supplied).

In this Instruction, the Court told the jury that if they find part of the defendants were members of a conspiracy and the other defendants were members of another conspiracy, both of which had the identical elements of the conspiracy charged in Count One (1), and that the specific conspiracy as charged in Count One (1) has not been proved beyond ~~a~~ reasonable doubt, then the defendants should be

found not guilty because the jury could not find part of the defendants guilty of one conspiracy and the other defendants guilty of a second conspiracy in *one verdict.*

Then follows a repugnant statement to the jury, in which the jury is told that they must determine the guilt or innocence of the defendants in the *charged conspiracy* if they find that the said conspiracy existed beyond a reasonable doubt in addition to the *other identical* conspiracy.

Not only is there a repugnancy in the foregoing language of the Court, but it must have been as confusing to the jury as was the previously quoted instructions.

The number and length of the Instructions given were surely confusing to the jury and were improper. 23 C. J. S. 889, § 1303. There are over 100 printed pages of instructions (D. App. 1453-1557).

The confusion in the Instructions was compounded by the numerous and continuous use of the phrase "and/or" (D. App. 453-1557).

There is only one specific entity charged as the perpetrator of the crimes charged in the indictment, the specific co-partnership consisting of the eight defendants. The indictment did not charge a specific partnership consisting of two or more of the defendants. There were eight defendants charged as constituting the specific co-partnership named in the indictment. The word "specific" has a special, limited and restricted meaning.

81 C. J. S., 400, defines the adjective "specific" as meaning "definite or making definite; explicit; particular; of an exact or particular nature; tending to specify or make particular; precise; limited or precise; precisely formulated or restricted. Although the term is relative, it is limited to a particular, definite, or precise thing, and implies precise or explicit designation."

The Court also gave the following instruction No. 41 on aiders and abettors to the jury (D. App. 1549-1551):

"Each of the eight (8) defendants are charged as principals in each of the Five (5) Counts of the Indictment. If you find from the evidence beyond a reasonable doubt that a part of the defendants were not principals and that two or more of the defendants are guilty as principals as partners of one or more or all of the Counts of the Indictment, then I call your attention to Title 18 United States Code Crimes and Criminal Procedure, Section 2. The following quoted pertinent parts of such section were in full force and effect at the times alleged in Counts One (1), Two (2), Three (3), Four (4), and Five (5):

> "'(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "'(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.'

"Thus a defendant may be charged in the Indictment as a principal by reason of being an aider, abettor, counsellor, commander, inducer or procurer of the commission of one or more or all of the offenses. Also, a defendant under said section may be guilty of one or more or all of the offenses without proof that he personally did every act constituting the said offenses, providing such defendant willfully and knowingly participates in the commission of the offense or offenses.

"With respect to the criminal conspiracy, Count One (1) of the Indictment, it is unnecessary that such aider knew the full extent of the alleged conspiracy or knew all the members of such alleged conspiracy.

"However, before you consider the evidence as to whether or not any of the defendants was or was not an aider, abettor, counsellor, commander, or procurer of the charged offense and/or offenses, you must ascertain and first determine from the evidence and beyond

a reasonable doubt that two or more of the principal defendants as partners were guilty of such offense and/or offenses. That is to say, the aider, abettor defendant or defendants could not have aided, abetted, counselled, commanded or procured the commission of such offense and/or offenses unless there were two or more guilty principal defendants as partners.

"And in order to aid and abet another to commit one or more or all of the alleged offenses, it is necessary that a defendant willfully and knowingly associate himself and participate in some way, as charged, with the criminal venture as charged, and that he willfully and knowingly participate in it as in something he wishes to bring about; and that he willfully and knowingly seek by some action of his to make it succeed. The aider and abettor must have the same specific criminal intent that I have referred to in these instructions."

It will also be noted (D. App. 1540) that in Instruction No. 35 (D. App. 1540), the jury was told that they must acquit the defendants on all the counts of the Indictment, but the Court added: "Provided such defendants were not aiders and abettors as defined elsewhere in Instruction No. 41." Similar statements were made in Instruction No. 35, at D. Appendix pages 1541, 1542 and 1544.

All of the defendants were indicted as members of a co-partnership for accepting wagers as co-partners in a wagering syndicate (D. App. 18-28).

Section 4902 of the Internal Revenue Code of 1954 recognizes that a co-partnership is a legal entity and a legal unit for the purpose of paying a special tax. This Section reads:

"Any number of persons doing business in co-partnership at any one place shall be required to pay but one single tax" (D. App. 1501).

The word "person" as used in the Internal Revenue Code (Title 26 U. S. C.) is defined by Section 7701, reading as follows (D. App. 1506-7):

"(a) When used in this title, * * *

(1) Person—The term 'person' shall be construed to mean and include an individual, * * * partnership, association, company * * *.

(2) Partnership and partner—The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation or venture is carried on, * * * and the term 'partner' includes a member in such syndicate, group, pool, joint venture, or organization" (App. 1506-1507).

Regulation Section 325.55 of the Internal Revenue Code provides:

"Any number of persons doing business in co-partnership shall be required to pay but one special tax. The collector may issue a special tax stamp to a co-partnership in a firm or trade name, provided the names and addresses of all members of the partnership are disclosed on Form 11-C, Special Tax Return."

Since a partnership is considered a legal entity for the purpose of engaging in the business of accepting wagers, that partnership is a principal and cannot be an employee nor an aider nor an abettor, nor an accessory of or to itself.

Since the foregoing Section 7701 defines the term "partner" to include a member in a syndicate, group, joint venture or organization, he must perforce be a principal of the partnership of which he is a member. He cannot aid, assist or abet, advise or counsel himself in the commission of a crime.

There is no evidence whatever in this cause that any defendant was an aider or abettor of any other defendant, nor that any defendant was an employee of any other defendant. Under the foregoing circumstances it was reversible and prejudicial error to have given the foregoing in-

struction and to have added the foregoing proviso complained of in other instructions. This is so held in *United States* v. *Horton*, 7 Cir., 180 F. 2d 427, 431; see also *Bollenbach* v. *United States*, 326 U. S. 601, 613-615; *United States* v. *Donnelley*, 179 F. 2d 229, 233.

Furthermore, it appears from the opinion of the Supreme Court of the United States, in the case of *United States* v. *Calamaro*, 354 U. S. 351, 360, that there can not be an aider and abettor to one who is engaged in the business of accepting wagers as a principal. In this case a "pick-up" man, having no proprietary interest in a "numbers game" was convicted of failing to pay the Occupational Tax and was fined $1,000.00.

The Court pointed out (page 352) that the Internal Revenue Code enacted two kinds of wagering taxes: (1) an Excise Tax imposed on persons "engaged in the business of accepting wagers," and (2) a special Occupational Tax, imposed not only on persons who are subject to the Excise Tax by "engaging in the business," but also all those who are "engaged in receiving" on behalf of one subject to the excise tax. It appears then that any defendant involved in this appealed case, if he accepted a wager, was a principal.

At page 360 of the *Calamaro* opinion, the Court held:

> "* * * that in the light of the unambiguous legislative history of the excise tax, it 'applies only to one who is engaged in the business of accepting wagers' as a principal * * * on his own account."

There was nothing in the indictment to indicate that any defendant was indicted as an aider and abettor. The indictment charged *all* of the defendants as members of a co-partnership, and hence, as principals. The giving of an instruction permitting the jury to find any defendant guilty of being an aider and abettor to another defendant

or other defendants, permitted the Government to try the defendants on another theory. This cannot be done. *Stirone* v. *United States*, 361 U. S. 212, 215-218.

The Court of Appeals, however, answered the foregoing objections and argument by observing (p. 54, this Petition):

> "The defendants complain of certain of the court's instructions asserting that they are confusing and repugnant. Much of defendants' argument in this respect is directed to features which were not made the basis of objections presented to the trial court and which arise only if the specific language is isolated and considered out of context. We have examined the instructions and it is our opinion that when considered in their entirety they contain no reversible error. In fact their detail evidences the exercise of meticulous care in informing the jury of the extent of the government's burden under the indictment. And the instruction given on guilt as an aider or abettor correctly states the law. The District Court did not err in giving that instruction nor the instructions it gave on conspiracy."

Considering the instructions in their entirety does not obliterate, not one, but three or four, erroneous instructions, which have heretofore been described and analyzed. The instruction on guilt as an aider and abettor may correctly state the law, but it was wholly inapplicable to the facts before the jury. It only becomes applicable when there is a principal whom one can aid and abet. In this case the principal was an entity consisting of eight co-partners, each one of whom is a principal.

The foregoing statement of the Court of Appeals does not answer the petitioners' claim of repugnancy in the instructions. The instructions in their entirety do not cure any erroneous, prejudicial instruction.

In *Bollenbach* v. *United States*, 326 U. S. 607, in reversing

a conviction because of an erroneous charge, the Court at page 614 said:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

In *Nicola* v. *United States*, 72 F. 2d 780, the Court, at page 787 said:

> "Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn."

Bollenbach and *Nicola* were cited in *United States* v. *Donnelley*, Cir. 7, 179 F. 2d 227, where the court said at page 233:

> "Where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, since it is impossible to tell which one the jury followed, it constitutes reversible error. *Nicola* v. *United States*, 3 Cir., 82 F. 2d 780, 787; *McFarland* v. *United States*, D. C. Cir., 174 F. 2d 538, 539. A conviction ought not rest on an equivocal direction to the jury upon a basic issue. *Bollenbach* v. *United States*, 326 U. S. 607, 613, 66 S. Ct. 402, 90 L. Ed. 350."

To the same effect is *Patterson* v. *United States*, 5 Cir. 183 F. 2d 687, 690; *United States* v. *Semenuik* (Cir. 7), 193 F. 2d 508; *United States* v. *Donnelley* (Cir. 7), 179 F. 2d 227, 233.

3 AND 4.

Homer H. Forrester, an Internal Revenue Service Agent in Reno, Nevada, testified that Defendants Irwin Gordon and Philip Share did not file an Application for Registry-Wagering Form 11-C for the period of July 1, 1957 to and including June 30, 1958, and that the said defendants did

not file Form 730 in the Office of the Internal Revenue Service in Reno, Nevada (D. App. 257-260).

John A. Wheeler, an Internal Revenue Service Agent, testified that neither Leo Shaffer nor Jules Horwick filed similar documents in the District Director's Office at Chicago, Illinois (D. App. 260-263).

Anthony Stapke, another Internal Revenue Service Agent, testified that Philip Share failed to file similar papers in the office of the District Director of Internal Revenue at Los Angeles (D. App. 262-263).

Imogene Barlow, an Internal Revenue Agent testified that James Tamer failed to file these documents in the office of the Internal Revenue Service in Detroit (D. App. 264-265) and Joseph J. Marchioni, another Internal Revenue Agent, testified that these forms had not been filed in the office of the Internal Revenue Service in Baltimore by the aforesaid defendants.

It appears from the evidence that the principal place of business of the defendants charged with the crimes in the indictment was at Terre Haute, Indiana, at 671½ Wabash Avenue (D. App. 398-401).

Hotel register cards introduced by the Government indicated that the residence of defendant Joseph Jacobson was Miami, Florida (D. App. 391-392); that of the defendant Charles L. Sumner was Indianapolis (D. App. 379); that of defendant Jules Horwick was Chicago, Illinois; that of Philip Share was Sherman Oaks, California; and that of Irwin Gordon was Las Vegas, Nevada (D. App. 393-394).

Government witness Delbert Paul Hopkins testified that he found no record in the office of the Internal Revenue Service located in Indianapolis, Indiana, that either Leo Shaffer, Jules Horwick, James Tamer, Joseph Jacobson, Charles L. Sumner, Irwin Gordon, or Philip Share filed an application for registry wagering, Form 11-C, in the

Indianapolis Internal Revenue office (D. App. 222-223, 226). This witness testified that there was no record of payments of Excise Wagering Tax by the said defendants (D. App. 282).

Regulation Section 325.50 promulgated by the Secretary-Treasurer under the provisions of the Internal Revenue Act, provides that the Application for Stamp Tax, Form 11-C, shall be filed

> "with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Baltimore, Md. The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein" (D. App. 1512).

Regulation Section 325.30 requires the Excise Tax Returns, together with the amount of tax, shall be filed

> "with the collector of internal revenue for the district in which is located the office or principal place of business of the person required to make the return. If such person resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If such person has no office, residence, or principal place of business in the United States, the return shall be filed with the collector at Baltimore, Md. The return shall be filed on or before the last day of the month following that for which it is made" (D. App. 1509-1511).

There is no understandable reason why the Government was permitted to prove that certain defendants did not file an application for a Registry-Wagering form or that they did not file the Excise Tax Returns, Form 730, in the respective cities of their respective residences nor in Indianapolis. The jury was instructed that they were to "try the case upon the evidence and the legitimate inferences you may draw from the evidence" (D. App. 1551). The jury was therefore permitted to infer, from the testimony of the foregoing witnesses, that the aforesaid defendants committed crimes in the cities of their respective residence and in Baltimore, Maryland and individually in Indianapolis.

The indictment charged the commission of crimes in Terre Haute, Indiana, within the Internal Revenue District of Indianapolis.

According to the regulations heretofore cited, the only place where the defendants *as a copartnership*, should have filed Form 11-C and Form 730 was in the office of the District Director of Internal Revenue at Indianapolis. It is only where the taxpayer does not have an office or principal place of business in the United States that his return must be filed with the Collector of Internal Revenue in the state in which he resides, and if he has no office or residence or principal place of business in the United States, the forms under discussion must be filed at Baltimore, Maryland.

The testimony of these witnesses becomes especially prejudicial in view of an instruction of the Court (D. App. 1538) in which it said "If you find from the evidence, beyond a reasonable doubt, that any defendant or defendants committed the alleged offenses in Counts Two (2) and /or Three (3) and/or Four (4) and/or Five (5) *and/or any other criminal offense* and you further find that the United States has not proved beyond a reasonable doubt that two

or more of such defendants did not conspire as alleged in Count One (1) to commit the substantive offenses of willful attempt to evade and defeat the wagering excise tax in one or more of the tax periods of September, and or October, and or November, 1957, as alleged in Count One (1) of the Indictment, then you must acquit that defendant or defendants of Count One (1)."

The Court of Appeals stated (P. 56, this Petition):

> "Defendants claim that the court erred in admitting into evidence, and in failing to strike, testimony that the defendants other than Wyatt failed to file excise tax returns. But this evidence clearly had a relevant and material bearing on the case. Evidence tending to negate that defendants were operating as individuals and not attempting to evade any tax due was admissible."

It is difficult to determine whether the Court of Appeals was referring to the failure of the defendants to file Forms 11-C and 730 in the Indianapolis office, or whether the Court's statement was intended to cover the failure to file the necessary documents in the cities of the respective residences of the defendants.

Whether or not the defendants were operating as *individuals* in their respective places of residence or as *individuals* in Terre Haute, Indiana, could not prove to the slightest degree that they were operating as a co-partnership within the allegations of the indictment. The Government had failed to prove the allegations in the indictment, charging the several crimes to have been committed in Terre Haute, Indiana; certainly the foregoing testimony that these defendants did not file *individual* returns with respect to Forms 11-C and 730, either in the cities of their respective residences or in Indianapolis would not have proved a single allegation in the indictment. The indictment required affirmative proof beyond a reasonable doubt and not negative proof.

Both the ruling of the trial court and the foregoing statement of the Court of Appeals are in conflict with decisions of this Honorable Court and of Courts of Appeal.

Testimony or evidence indicating or intimating to the jury that a defendant has committed another crime with which he is not charged constitutes reversible error. *Boyd* v. *United States*, 142 U. S. 450, 458; *United States* v. *McGee*, 261 F. 2d 609, 611; *Sang Soon Sur* v. *United States*, 167 F. 2d 431, 432.

5.

The court gave innumerable instructions that were confusing because of the use of the phrase "and or". This phrase appears forty-two times in the instructions. It appears ten times in D. App. 1480, three times in D. App. 1481, three times in D. App. 1487, twice in D. App. 1516, twice in D. App. 1519, three times in D. App. 1530, five times in D. App. 1531, four times in D. App. 1538 and ten times in D. App. 1543.

With respect to the use of this phrase, the Court of Appeals stated (Page 54, this Petition):

> "The defendants complain of certain of the court's instructions asserting that they are confusing and repugnant. Much of defendants' argument in this respect is directed to features which were not made the basis of objections presented to the trial court and which arise only if the specific language is isolated and considered out of context. We have examined the instructions and it is our opinion that when considered in their entirety they contain no reversible error. In fact their detail evidences the exercise of meticulous care in informing the jury of the extent of the government's burden under the indictment."

This conclusion of the Court of Appeals is in direct conflict with decisions of other circuits and of this Hon-

orable Court. In *Irving Trust Co.* v. *Rose* (4 Cir.), 67 F. 2d 89, 90, the Court observed:

> "We do not approve of the use in formal pleadings of the dubious term 'and or', for in this connection it imparts uncertainty where clarity and definiteness are required."

"And or" was called a "linguistic abomination" in *Commercial Standard Ins.* v. *Davis* (5 Cir.), 68 F. 2d 108, 109, where the Court held:

> "The petition in the State Court is brought against 'Commercial Standard Insurance Company and or Century Indemnity Company,' and abounds in allegations containing that linguistic abomination 'and or' which certainly has no place in the art of pleading."

How much more important is clarity in instructions? Because of the lengthy, involved instructions, the numerous repugnancies in the instructions, the confusing and, in many instances, unintelligible language, and the repeated use of the phrase, "and or", the probabilities of confusion in the minds of the jurors are glaringly manifest. In *Bihn* v. *United States*, 328 U. S. 633, 638, the Supreme Court stated:

> "And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed."

6.

Government witness Glen Johnson, an expert accountant, was asked a number of hypothetical questions, in which he was requested to assume that the defendants were co-partners of a wagering syndicate. A sample of one of these questions is (D. App. 1289):

> "Now, Mr. Johnson, with the exception of the item

designated 'Office 120221' appearing on page one of Exhibit 137, and the items designated 'Telephone, 5000' appearing on 137-D or the fifth page of Exhibit 137, *assume* that the amount shown in the first or left-hand column of Government's Exhibit 137 and its component parts represents amounts receivable *or amounts due to the defendants as co-partners of a wagering syndicate* from various bettors during the months of September, October and November of 1957, and *assume* further that the amounts shown in the second or right-hand column of Government's Exhibit 137 represents amounts payable or amounts owed by the defendants *as co-partners of a wagering syndicate* to various bettors during the same period of September, October and November of 1957, and *assuming* further that the amounts receivable and payable resulted from gross wagers placed with, and accepted by, the *defendants as co-partners of a wagering syndicate* from bettors during the months of September, October and November of 1957, can you compute a total of both columns as previously identified of Government's Exhibit 137; that is, a total of both columns?'' (Italics supplied.)

Similar hypothetical questions were asked of Mr. Johnson (D. App. 1292, 1296-1297, 1299, 1302, 1303-1304, 1308, 1309-1310). Objections were made to these questions, particularly because there was no evidence in the case that the defendants were engaged in the business of accepting wagers as so-partners and that these hypothetical questions invaded the province of the jury (D. App. 1290, 1294-1295, 1298, 1300, 1302-1304, 1309-1312). The objection at D. App. 1300 directed the court's attention to the continuous repetition of the word ''syndicate'' and ''co-partnership''.

All of the objections were overruled (D. App. 1291, 1296, 1298, 1302-1304, 1308-1309).

All of these questions were directed to the mere computation of the totals of figures appearing on various

exhibits, such as the total of accounts receivable which were due individual defendants and the computation of the total of Excise Taxes that were due by individual defendants.

In the foregoing question set forth in full, Mr. Johnson was asked to *assume* that the figures in the left-hand column of Government's Exhibit 137 (Book of Exhibits, (p. 56) represented amounts receivable or due to the defendants as co-partners of a wagering syndicate, and that the right-hand column represented amounts receivable and payable which resulted from gross wagers accepted by the defendants as co-partners of a wagering syndicate. Examination of Government's Exhibit 137 in the Book of Exhibits does not indicate any basis for such assumptions in this question nor does Government's Exhibit 137D indicate any basis for the assumption. The same criticism can be made with respect to the hypothetical question (D. App. 1292) concerning Government's Exhibit 138 (Book of Exhibits, p. 62).

With respect to Exhibit 136 (Book of Exhibits, pp. 38-55), he was asked to assume (D. App. 1294) that the parts of this exhibit were records of gross wagers accepted by the defendants as co-partners of a wagering syndicate on various dates, represented in hundreds of dollars the amount of gross wagers accepted by the defendants as co-partners of a wagering syndicate. He was then asked to compute the total dollar amount of the gross wagers accepted by the defendants as such co-partners on football games played on November 29, 1957. The other hypothetical questions heretofore referred to were similar in nature. Both assumptions in the hypothetical questions invaded the province of the jury.

The five counts of the indictment charged the defendants with having committed the conspiracy and the substantive crimes of accepting wages *as co-partners in a wagering*

syndicate. That was the issue that the jury had to determine. The statutes and regulations with respect to accepting wagers, purchasing a stamp for said business and paying an excise tax on the wagers of 10%, recognize that a partnership was a distinct entity, separate and apart from the members thereof.

The hypothetical questions certainly invaded the province of the jury and contained an assumption of ultimate facts which had to be found by the jury. In the questions asked of the witness he was to assume that the defendants were engaged in the business of accepting wagers as co-partners and this was repeated almost twenty times. When the trial court overruled the objections to the hypothetical questions it, for all practical purposes, *directed* the jury to find that the defendants were "engaged in the business of accepting wagers as co-partners." These rulings by the court were erroneous and related to substantial rights of the defendants. In *Bihn* v. *United States*, 328 U. S. 633, 638, the Supreme Court said:

> "Yet as stated in *McCandless* v. *United States*, 298 U. S. 342, 347-348, 'an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial'."

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term, 1960—April Session, 1961.

Nos. 12862-12867
United States of America,
Plaintiff-Appellee,
vs.
Leo Shaffer, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

June 13, 1961.

Before SCHNACKENBERG, CASTLE and MAJOR, *Circuit Judges.*

CASTLE, *Circuit Judge.* Defendants-appellants, Leo Shaffer, Philip Share, Irwin Gordon, James Tamer, Jules Horwick and Edgar M. Wyatt were convicted on all counts of a five count indictment. Each was sentenced to concurrent four year terms on the first four counts, to a one year consecutive term on Count V, and was fined $10,000.00 on Count I, $10,000.00 on Count II and $5,000 on Count V,

making a total of five years imprisonment and $25,000.00 in fines.[1]

Count I of the indictment charges that defendants engaged in the business of accepting wagers as co-partners in a wagering syndicate at Terre Haute, Indiana, and in violation of 18 U.S.C.A. §371 conspired to wilfully attempt to evade and defeat a large part of the excise tax on wagers due and owing under Section 4401 of the Internal Revenue Code of 1954 for the months of September, October and November, 1957. Count II charges that defendants as co-partners in a wagering syndicate wilfully and knowingly attempted to evade and defeat the excise tax due on wagers totalling $326,315.20, accepted in the month of September, 1957, in violation of 26 U.S.C.A. §7201. Counts III and IV charge identical violations pertaining to wagers accepted in November and December 1957 totalling $1,305,260.80 and $1,631,576.00 respectively. Count V charges that the defendants were engaged in the business of accepting wagers as co-partners of a wagering syndicate during the aforementioned period and that they violated 26 U.S.C.A. §7203 by wilfully and knowingly failing to register as required by Section 4412 of the Internal Revenue Code of 1954.

Defendants in their appeals assert numerous errors which may be summarized as presenting the following basic contested issues:

(1) Whether or not the defendants were tried by a fair and impartial jury.

(2) Whether or not there was substantial evidence sufficient to sustain the convictions of the defendants.

(3) Whether or not there was a variance between the indictment and the case as it was submitted to the jury under the instructions.

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1. Joseph Jacobson and Charles L. Sumner were also named as defendants and convicted. Their prison sentences were suspended and they did not appeal.

(4) Whether or not there was prejudicial and reversible error in the admission of evidence or in instructing the jury.

(5) Whether or not prejudicial and reversible error resulted from the government's calling of witnesses who invoked the Fifth Amendment.

(6) Whether or not the sentence imposed on each defendant under Count V of the indictment is excessive.

On the issue of whether there is substantial evidence to support the convictions we must view the evidence in the light most favorable to the government. It is not for us to weigh the evidence nor reject inferences properly deducible therefrom. *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Calvito*, 7 Cir., 284 F. 2d 464, cert. den., 365 U. S. 881; *United States* v. *Pinna*, 7 Cir., 229 F. 2d 216. With that rule in mind, we shall briefly refer to the facts and circumstances as developed by the proof.

From about the middle of September until November 30, 1957 a wager accepting business was conducted by telephone from a third-floor room in Terre Haute, Indiana, accessible from a street level entrance designated as 671½ Wabash Avenue. Most of the wagering was on the scores of college and professional football games. The bets were in sizable amounts, many ranging from $1,000.00 to $10,000.00, and totaled over three million dollars. The wagers were with bettors scattered throughout the United States from coast to coast and were received by long distance telephone calls.

In August of 1957 defendant Edgar M. Wyatt, a resident of Terre Haute, rented the room for a term of four months commencing September 1, arranged for the installation of eight telephones operating in banks of four with one unlisted number assigned to each bank, and for the receipt of sports wire service. He deposited $5,000.00 to

cover estimated long distance tolls for a thirty day period and paid in advance for fifteen days' billing on the wire service.

About the middle of September the other defendants arrived in Terre Haute from various other cities. Shaffer, Jacobson, and Tamer checked in simultaneously at a local hotel where Wyatt had previously reserved a suite of adjoining rooms for them. Horwick registered at a nearby hotel but a few days later removed to the hotel where the others were staying and occupied a room close to the suite. Share and Gordon arrived about a week later and Sumner shortly thereafter. Sumner was assigned to the suite occupied by Shaffer and Jacobson. The hotel was about two hundred feet from the entrance at 671½ Wabash Avenue.

All of the defendants were observed frequently in a restaurant adjacent to the entrance to the room and during periods when the latter premises was under surveillance were observed entering at various times in the morning, each using his own key to open the street level door which was always kept locked. The defendants usually left the premises together each evening. During the two and one-half month period involved over five thousand long distance telephone charges were made to the telephones.

More than fifty witnesses testified to placing bets by telephone on calls to the two unlisted numbers assigned to the telephones. Some asked for one of the individual defendants when they called, others placed their bets with whoever answered the phone or with someone to whom the defendant called transferred the call. In a number of instances bettors who had lost were instructed to remit the cash by registered mail to E. M. Wyatt or E. M. Wyatt & Company although they knew neither and had placed their bet with one of the defendants other than Wyatt. One bettor on inquiring whether he was betting

with defendant Shaffer was informed "Yes, with his company".

On November 29, 1957 the room was entered pursuant to a search warrant at approximately 1:30 P. M. Horwick was leaving the premises. The remaining defendants, except Tamer, were in the room, three engaged in telephone conversations. Among other items, a record of bettor accounts receivable and payable was found on the premises. It reflects the net amount due from or payable to each bettor. There is no indication that the amount is due to or payable by any particular one of the defendants. Also found were betting slips recording wagers in the handwriting of all six defendants and schedules on which a running balance of the gross amount wagered on each game yet to be played was recorded. These amounts were identical with the total of the betting slips on the particular game. Where a game had been played there was an entry of the net gain or loss on that game.

None of the defendants had filed the special tax return and application for registry-wagering or a monthly excise tax return, as partners or members of any group or syndicate. With the exception of Wyatt, none of the defendants registered as being engaged in the business of accepting wagers during the period in question. In August of 1957 Wyatt had withdrawn from a partnership, known as the Clover Club, engaged in the business of accepting wagers at Terre Haute. He had previously signed and filed the special tax returns and applications for registry-wagering on behalf of that partnership which listed and identified the partners as required by law and pertinent Treasury Regulation. On September 12, 1957 Wyatt filed a special tax return and application for registry-wagering at 671½ Wabash Avenue listing himself as the owner and stating he was in the business of accepting wagers on his own account. He filed monthly excise tax returns for the

months of September, October and November, 1957. They were signed "E. M. Wyatt, owner" and in the aggregate covered the tax due on wagers in the amount of $5625.00.

We have not attempted to set forth the evidence in detail but from a careful study of the record we are convinced that there was ample and substantial basis for the jury to conclude that the defendants conspired to utilize the registration and the monthly tax returns of Wyatt as a front to mask the magnitude of the wagering operation they actually conducted with the plan and design of evading the substantial tax actually due. The defendants' contention that the evidence does not support a conclusion that the operation conducted at 671½ Wabash Avenue was a partnership[2] or syndicate operation is without merit.

The defendants complain of certain of the court's instructions asserting that they are confusing and repugnant. Much of defendants' argument in this respect is directed to features which were not made the basis of objections presented to the trial court and which arise only if the specific language is isolated and considered out of context. We have examined the instructions and it is our opinion that when considered in their entirety they contain no reversible error. In fact their detail evidences the exercise of meticulous care in informing the jury of the extent of the government's burden under the indictment. And the instruction given on guilt as an aider or abettor correctly states the law. The District Court did not err in giving that instruction nor the instructions it gave on conspiracy.

There is no evidence here that the acts of concealment were for the purpose of concealing prior criminal acts

2. 26 U. S. C. A. § 7701 defines "partnership" as including a "syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation or venture is carried on * * *".

and the instructions tendered on such theory were properly refused. *United States* v. *Clancy*, 7 Cir., 276 F. 2d 617.[3] Nor was there a basis for the lesser included offense instructions requested by defendants. Here it was possible to have committed the greater offense charged without having committed the lesser (evasion of the occupational tax on wagering in violation of 26 U.S.C.A. § 7262). The instructions were properly refused. Cf. *James* v. *United States*, 9 Cir., 238 F. 2d 681; Rule 31(c), Federal Rules of Criminal Procedure, 18 U.S.C.A.

Defendants claim there is a variance between the indictment and the instructions under which the case was submitted to the jury. It is argued that a fatal variance resulted from the instructions permitting conviction of all defendants if any two or more were members of the specific partnership charged in the indictment and the remaining defendants were aiders and abettors. We do not agree. The elimination of one or more of the defendants as a member of the wagering syndicate does not eliminate the existence of the syndicate. And it is not necessary that aiders and abettors be charged as such in the indictment. *United States* v. *Monticello*, 3 Cir., 264 F. 2d 47; *Mays* v. *United States*, 8 Cir., 261 F. 2d 662. There was no variance and *Stirone* v. *United States*, 361 U. S. 212, relied upon by defendants is without application.

Defendants' reliance upon *Ingram* v. *United States*, 360 U. S. 672, is misplaced. *Ingram* involved convictions of conspiracy to evade and defeat payment of the wagering excise tax but the convictions which were reversed were those of two employees without proprietary interest in the operation and the reversals were based on a lack of evidence of any knowledge of the employers' tax liability. Evidence of knowledge was not lacking in the instant case.

3. Reversed on other grounds, 365 U. S. 312.

Wyatt's occupational tax stamp was posted on the wall of the room.

The defendants contend that the District Court committed reversible error in the admission of testimony and exhibits concerning the previous partnership relationship of Wyatt in the Clover Club operation and the special tax returns and applications for registry-wagering executed and filed by him which listed the partners in that operation. At the time of its admission this evidence was limited to defendant Wyatt and its was admissible to show his knowledge of the wagering-registry requirements of the Internal Revenue Code. We perceive no error in this connection. Nor was it a basis for a mistrial or severance.

It is urged that the court erred in permitting a government witness, whose qualifications are not in dispute, to testify as to his computation of the gross amount of wagers reflected in the records found in the room. The hypothetical questions asked assumed that the wagering operation was a co-partnership otherwise their answers simply represented a computation of the amount of wagers from records in evidence. The court carefully instructed the jury that it was not to take for granted that the statements contained in he hypothetical questions are true but should carefully scrutinize the evidence to so determine and give no weight to opinions based on any material statement found not to be true. The court did not err in the admission of this testimony.

Defendants claim that the court erred in admitting into evidence, and in failing to strike, testimony that the defendants other than Wyatt failed to file excise tax returns. But this evidence clearly had a relevant and material bearing on the case. Evidence tending to negate that defendants were operating as individuals and not attempting to evade any tax due was admissible. And there is no merit to the contention that defendants' privilege against

self-incrimination was violated by the admission of such testimony.

The joint motion of certain of the defendants to quash the search warrant and suppress evidence was properly overruled. An examination of the face of the warrant shows that it is completely adequate and states sufficient grounds for its issuance. And, contrary to defendants' contentions, the items seized at the time of the search and later admitted in evidence were all instrumentalities of the crime. The betting slips, schedules of gross amounts wagered on each game, record of accounts receivable and payable and other records were all items utilized in the continued operation of the venture and instrumentalities of the crime charged. *United States* v. *Lefkowitz*, 285 U. S. 452; *Marron* v. *United States*, 275 U. S. 192, 199; *Merritt* v. *United States*, 6 Cir., 249 F. 2d 19.

During the trial the government called over sixty witnesses in corroboration of the betting records and toll slips. Nine of these invoked the Fifth Amendment. Six of the nine had claimed the privilege before the grand jury. The error, if any, in calling such witnesses is cured by the cautionary instruction given by the District Court. *United States* v. *Magin*, 7 Cir., 280 F. 2d 74, 79.

Count V of the indictment charged a violation of 26 U. S. C. A. § 7203. The punishment imposed was within that authorized by that statute and on the record and under the circumstances here involved it was not excessive. *United States* v. *Coduto*, 7 Cir., 284 F. 2d 464, 469, cert. den., 365 U. S. 881; *United States* v. *Chicago Professional Schools, Inc., et al.*, 7 Cir., concurring opinion, April 26, 1961, ... F. 2d ..... Defendants' contention that Count V charges a violation of 26 U. S. C. A. § 7272 (which imposes "a penalty of $50") rather than of § 7203 is without substance.

Defendants assert that because of prejudicial newspaper, radio and television publicity occurring on the eve of the trial they were not afforded a trial by an impartial jury. The trial commenced on a Monday. The publicity in question occurred during the previous week-end. There is no question but what the material circulated through the press and other communication media contained statements prejudicial to the defendants, characterizing some as professional gamblers, others as ex-convicts, and containing representations of prior criminal activities and convictions. Although defendants contend that the pre-trial publicity was generated at least in part by the government the record does not support them in this contention in so far as any of the prejudicial material is concerned.

On the morning of the trial defendants filed a motion for an indefinite continuance followed by a motion that the case be transferred to another district, both of which were overruled. The District Court carefully interrogated each prospective juror on voir dire examination as to whether or not the newspaper articles, radio broadcasts or telecasts had come to his attention and requested the parties to submit any additional questions which either party felt should be propounded to the jurors. Defendants submitted none.

Of the twelve jurymen who tried the case, only five had heard of the case through the newspaper articles in question. Four of these could not recall what they had read in the articles. One just saw the headlines and did not recall the article itself. Each of the twelve jurors stated that he had formed no opinion as to the guilt or innocence of the defendants. None had any opinion concerning any of the facts of the case because of anything they had read or heard about it and all twelve stated that they would rely entirely upon the evidence to be heard in arriving at a verdict. Following the selection of the twelfth

juror but before the jury was accepted or sworn the court gave the defendants an unlimited number of additional peremptory challenges. Defendants declined to exercise the unlimited additional peremptory challenges offered and accepted the entire jury panel, subject to their standing objection for cause. During the voir dire examination defendants had requested that all jurors who had heard of the case through the pre-trial publicity here in question be excused for cause.

Defendants rely heavily upon *Marshall* v. *United States*, 360 U. S. 310 as sustaining their contention that they were not afforded a trial by a fair and impartial jury and that the case should be reversed and a new trial awarded. In our opinion the defendants' refusal to exercise the peremptory challenges offered them precludes any application of *Marshall*. In *Marshall* the prejudicial newspaper articles were read by jurors during the trial of the case and there was no opportunity to secure others in their place. The record in this case does not establish that it was impossible to secure jurors who had not seen or heard the publicity in question. Seven of the jurors who tried the case had not and at the time defendants refused the additional peremptory challenges and accepted the jury forty veniremen had not yet been called or interrogated on voir dire examination. In *Marshall* it was recognized that the trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles and that each case must turn on its special facts. On the record before us we find no reversible error on this issue.

We have considered all other issues raised by the defendants but find the arguments advanced in support thereof to be without merit. We have not made specific reference to many of the authorities cited and analyzed in the briefs but we have considered them and each of the

arguments advanced by defendants in support of their position on the issues and discussed those issues we deemed necessary.

We conclude that the defendants were accorded a fair and impartial trial free from reversible error. Each of the judgments of the District Court is affirmed.

AFFIRMED.

ORDER AFFIRMING JUDGMENTS.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Tuesday, June 13, 1961.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.

Nos. 12862 thru 12867

United States of America,
Plaintiff-Appellee,
vs.
Leo Shaffer, Philip Share, Irwin Gordon, James Tamer, Jules Horwick, Edgar M. Wyatt,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

ORDER DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Wednesday, August 2, 1961.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.

Nos. 12862 thru 12867 United States of America, *Plaintiff-Appellee,* *vs.* Leo Shaffer, et al. *Defendants-Appellants.*	Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

It Is Ordered by the Court that the petition for a rehearing of this cause, filed herein on June 27, 1961, on behalf of defendants-appellants Leo Shaffer, Jules Horwick and Edgar M. Wyatt, and the petition for a rehearing filed herein on June 27, 1961, on behalf of defendants-appellants Philip Share, Irwin Gordon and James Tamer, be and the same are hereby, DENIED.

CERTIFICATE OF CLERK, U. S. C. A.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of the OPINION, filed June 13, 1961; JUDGMENT, entered June 13, 1961; ORDER DENYING PETITIONS FOR REHEARING, entered August 2, 1961.

Cause No. 12862 thru 67

United States of America,

vs.

Leo Shaffer, *et al.*,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-first day of August, A. D. 1961.

/S/ KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT
FILED
SEP 1 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 379.

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. .....

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on June 13, 1961.

OPINION BELOW.

The opinion of the Court of Appeals (infra, p. 23) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 13, 1961 (infra, p. 34). Motion for rehearing was denied on August 2, 1961 (infra, p. 35). The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

QUESTIONS PRESENTED.

1. Whether failure to file wagering excise tax returns and pay the tax, due subsequent to arrest, may constitute the gravamen of criminal charges, where to file such returns and pay such tax would incriminate the defendants of pending charges of failing to register for the wagering business and pay the occupational tax.

2. Whether petitioners were denied a fair trial by being tried by jurors who had been exposed to prejudicial publicity as to previous felony convictions, and other criminal and prejudicial activity of the petitioners.

3. Whether it was prejudicial error for the instructions to fail to require a finding that employees of a wagering business, who were not themselves liable to pay the federal wagering taxes, knew that their employers were evading such taxes, and whether the evidence was sufficient to show such knowledge.

4. Whether bank account records and records of accounts may be seized as instrumentalities of the crimes of failing to register, to pay the federal wagering occupational tax, and to pay the wagering excise tax.

5. Whether petitioners, convicted of wilfully failing to register with the District Director of Internal Revenue (punishable by a maximum $50 fine under Section 7272 of the 1954 Internal Revenue Code), may be sentenced instead for wilfully failing to file a return (punishable by a maximum of one year's imprisonment and a $10,000 fine under Section 7203 of the Internal Revenue Code).

STATUTES INVOLVED.

Section 7203, Internal Revenue Code, 1954:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by

regulations made under authority thereof to make a return (**other than a return required under authority of section 6015 or section 6016**), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Section 7272, Internal Revenue Code, 1954:

"In general.—any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50."

STATEMENT.

Petitioners and all co-defendants were convicted on all five counts of an indictment. Count I charged that defendants, engaged in the business of accepting wagers as co-partners in a wagering syndicate at Terre Haute, Indiana, conspired to wilfully attempt to evade a large part of the excise tax on wagers due and owing by said syndicate for the months of September, October and November, 1957. Count II charged that defendants, as co-partners of a wagering syndicate, did wilfully attempt to evade the excise tax due and owing by said syndicate on wagers accepted in September, 1957. Counts III and IV contained a similar charge for October and November, 1957. Count V charged that defendants, as co-partners of a wagering syndicate, wilfully failed to register with the District Director of Internal Revenue (D. A. 18-29).[1] Each defend-

[1] The record will be referred to as Defendants' Appendix and Government Appendix.

ant was sentenced to concurrent four year prison terms under the first four counts, to a one year consecutive term of imprisonment under Count V, making a total five year term and was fined $10,000 on Count I, $10,000 on Count II and $5,000 on Count V for a total fine of $25,000 (D. A. 1582-1591).[2]

The evidence adduced by the government follows: On September 1, 1957, defendant Wyatt, a resident of Terre Haute, Indiana, leased from one Traum, who operated the Manor House Restaurant at 673 Wabash Avenue in Terre Haute, some adjoining third floor premises at 671½ Wabash Avenue for September 1 to December 31, 1957 (D. A. 396, 401-402, 404, 547-548, 696). Soon thereafter, Wyatt obtained telephone service at these premises (D. A. 314, 319, 321), together with credit cards for himself, defendant Shaffer and three apparently fictitious names (D. A. 348-352). He also obtained installation of a ticker tape sports service (D. A. 408-409, 412-415). On September 13, defendants Shaffer, Horwick, Jacobson and petitioner Tamer registered in Terre Haute hotels (D. A. 371-373, 389), Shaffer and Jacobson occupying rooms reserved by Wyatt (D. A. 366, 375). On September 21 petitioners Share and Gordon also registered in a Terre Haute hotel, as did the defendant Summer on September 26 (D. A. 392-393, 378-379). All of the defendants remained so registered until after the premises were raided on November 29, 1957, except petitioner Tamer who left on November 26, 1957 (D. A. 382, 391, 394).

On September 12, 1957, Wyatt obtained a gambling stamp from the District Director of Internal Revenue (Exhibit 1), for his business at 671½ Wabash Avenue (D. A. 298-303, 238). He also filed monthly wagering excise tax returns, for September, October and November, 1957, dated

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[2] The prison sentences of Jacobson and Summer were suspended.

October 30, November 30 and December 31, 1957, respectively (Exhibits 2, 3 and 4; D. A. 239-240, 244-245).[3]

Evidence was admitted that no other wagering stamps were obtained or returns filed by any of the defendants or any partnership consisting of any of them, either before or after their arrest (D. A. 221-237, 258-263, 265, 267).

Defendant Shaffer arranged with the Kaplan Sports Service for its mailing direct to his clients its bi-weekly handicapping service (D. A. 1156-1159, 1162-1163, 1167, 1170, 1170-1171, 1173-1174), and defendant Horwick arranged with this Service for one "Joe F." to pick up copies of its service, as he had done in past years (D. A. 1171-1172, 1182-1183). None of the other defendants purchased any of its service (D. A. 1166, 1177-1178, 1180-1181).

On October 2, 1957, defendant Wyatt opened a small bank account in a local bank in the name of Wyatt Service Company, and mail was received in that name both at 671½ Wabash, which was kept locked (D. A. 450-451) and at the Manor House Restaurant (D. A. 537-542). The customer usually indicated on the inside of the letter the particular defendant to whom the money was to go, which was in all cases either Shaffer or Horwick (D. A. 938-984). The postal authorities, who had been alerted and maintained a mail watch on the 671½ Wabash address, could only identify Horwick as having mailed letters, although another unidentified person assisted on one occasion (D. A. 474-480, 483).

The porter of the Manor House Restaurant cleaned the 671½ Wabash Avenue premises (D. A. 546) and delivered food there (D. A. 549-550, 558), being paid only by Wyatt and Shaffer (D. A. 561-562, 565-566). He saw slips of

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[3] The last return was admitted only against Wyatt (D. A. 249, 284-285, 1399-1400, 1491).

paper (D. A. 548-549), heard telephones ring, and saw some of the defendants take notes (D. A. 553, 555, 560, 561).

The waitresses and employees at the Manor House Restaurant saw the defendants eating meals there (D. A. 489-494, 498-509, 513-527), and revenue agents observed the defendants on occasion enter and leave the 671½ premises (D. A. 568-602, 612-664). Fifty-seven persons testified they placed bets by telephone at the 671½ Wabash Avenue premises, most of whom only dealt with defendant Jules Horwick (D. A. 848, 901, 915, 924, 929, 941, 943-944, 945, 968, 987, 989, 992, 1001, 1003, 1013-1014, 1016-1017, 1019, 1032, 1039, 1053, 1068, 1081-1082, 1116, 1118, 1141, 1206, 1209, 1235, 1276, 1277), or defendant Shaffer (D. A. 852, 938, 970, 973, 977, 981, 1015, 1031, 1047, 1076, 1132, 1147, 1192, 1198).

On November 29, 1957, federal agents, after obtaining a search warrant, raided the premises. They waited until they saw Horwick leave the premises, at which time they restrained him and obtained the keys to the premises from him. They testified that, when arrested by them, he dropped the keys to the pavement, which they picked up (D. A. 695-696, 706-709, 805-807, 825-827). The agents, with guns drawn (D. A. 783, 822-823, 833) and without identifying themselves, used the keys to obtain entrance to the premises (D. A. 828, 837-838), where they found all the defendants, except Horwick, whom they arrested on the street, and Tamer, who had left the business (D. A. 709-779, 808). They seized everything in the premises. Of the items seized, Exhibits 123 through 173 were admitted into evidence (D. A. 713-769). Newspaper reporters, even from Indianapolis, either accompanied the officers or appeared during the raid (D. A. 62, 780-782).

Among the papers seized and admitted in evidence were 611 betting slips (D. A. 739-740, 745-748), covering the

last few days of the business, some of which were in the handwriting of each of the defendants (D. A. 1339-1393). In addition to the accounting records kept by defendant Wyatt (Exhibit 172), which conformed to that which he reported for September and October, 1957 (Exhibits 2, 3, 172C and 172D), two sets of summary accounting records of past winnings and losses, still not paid, were found, one of these (Exhibit 137), totaled $1,678,495 (D. A. 1289-1291) and the other (Exhibit 138) totaled $166,212 (D. A. 1292-1293). An Agent witness testified that in his opinion these records indicated that a total of $2,895,282 in gross wagers had been accepted at 671½ Wabash Street during September, October and November, 1957 (D. A. 1302-1305).

In his lengthy charge (D. A. 1453-1559), to which exceptions were taken (D. A. 1559-1576, 1442-1452), the trial judge allowed the jury to convict any defendant if he were a mere employee who did or did not receive wagers providing such employee was an aider or abettor of a partnership consisting of any two of the defendants (D. A. 1543-1544, 1549-1551, 1540-1542). The jury was also told that a conspiracy is a form of partnership and that similarity of conduct and association of defendants with each other is a fact which may be considered in determining if there was a conspiracy (D. A. 1522). The jury was permitted to consider the evidence and guilt of a defendant on one count for the purpose of determining his intent on the other counts (D. A. 1490).

Prejudicial publicity on the eve of trial. Newspaper articles were published on the week-end before trial which commenced on June 22, 1959. According to the newspapers on June 20, 1959, the United States Attorney held a conference with reporters in a Terre Haute Hotel room (Exhibit F) in which he stated that he had an "overwhelming mass of evidence" and predicted that "his

evidence [was] strong enough to warrant convictions against all eight defendants" (Exhibit B). He also "said he [would] call 200 witnesses, most of them wealthy betters and bookies who paraded before a grand jury last summer in the much ballyhooed probe"; he promised new witnesses including "nationally known persons closely connected with the sporting field"; he said this was the "most important case ever to be tried in this district" or "ever to be aired anywhere"; he reported that an observer from the Department of Justice would be present; he stated that he hoped to cut the trial to six weeks, but that the case would still cost the Government $100,000; he said that he would oppose separation of witnesses; and he implied that he might call the local Mayor and Chief of Police whom he inferred were in on the gambling enterprise (Exhibits B and D). The United States Attorney also estimated that the betting center took in millions although he could not prove that amount (Exhibit C), and that the Government had already spent $35,000 in preparing the case (Exhibit D).

The article appearing across the top of the front page of the Indianapolis Times, on the Saturday before the trial, contained the following description of the defendants (Exhibit F): "Charles L. (Buck) Sumner, who was Democratic sheriff of Marion County in 1931-34. Joey Jacobs (Joseph Jacobson), longtime Indianapolis professional gambler. Leo (Bookie) Shaffer, Chicago ex-convict, who operated the syndicate in Canada for several years before moving it to Terre Haute last Septembe.. Jules Horwick, Chicago, who ran the syndicate with Shaffer until the Canadian Mounties raided it in 1956. Philip (Flippy) Share, Minneapolis and Las Vegas, an ex-convict, who beat the rap on two murders and several bank robberies. Irwin Gordon, Las Vegas gambler. James Tamer, Detroit and Miami, previously convicted of bank robbery and gambling. Eddie M. Wyatt, Terre Haute,

longtime Terre Haute tavernkeeper who served time in Leavenworth with Share and Shaffer." The article in the Indianapolis Star carried pictures of the defendants, the caption to which referred to them as gamblers and ex-convicts (Exhibit B).

The Monday, June 22, Terre Haute Star, where the case was going to trial, in addition to containing statements attributed to the U. S. Attorney, stated (Exhibit D): "The defendants are: Leo Shaffer, Chicago, known among his associates as 'bookie'. He was fined $10,000 and costs after pleading guilty to operating a Winnepeg, Canada, gambling syndicate in the Fall of 1956. Jules Horwick, Chicago, arrested with Shaffer by Canadian authorities and fined $10,000 and costs. C. L. 'Buck' Sumner, Indianapolis, sheriff of Marion county from 1931 to 1934 and reportedly engaged in various forms of gambling for a number of years. Joseph Jacobson, Indianapolis, allegedly involved in gambling most of his adult life. E. M. Wyatt, operator of Terre Haute clubs and the man who is supposed to have rented the third-floor hideout. Irwin Gordon, Las Vegas, Nev., the youngest and presumably least experienced of the defendants. Phillip Share, Las Vegas, James Tamer, Miami Beach, Fla."

All newspapers, radio and television stations carried stories (D. A. 122, 123, 127, 151, 156), but all of them were not available to petitioners in the short time before the hearings.

The U. S. Attorney asserted that there had been no proof as to what information he gave the press but he admitted talking to the press about the case and deemed it his duty to do so (D. A. 108). He also admitted talking to the press about the case in oral argument in the court below.

Before the trial began, on Monday, the defendants moved for a continuance and for a transfer (D. A. 87-90).

After hearings (D. A. 91-114), the court overruled them. (D. A. 108-112).

Of those who were asked, 40 of 43 veniremen had been exposed to newspaper articles or broadcasts about the case (D. A. 115-211, D. A. 207-9). Two of the three who had not seen articles were caused to be removed by the Government for cause, on other grounds (D. A. 138-139); the other served as an alternate juror. A few veniremen were dismissed before reaching the matter (D. A. 206, 278, 303-304). Of the 40, 29 stated that they had been exposed to newspaper articles or television broadcasts on the week-end before trial (Armstrong, D. A. 115; Lewis, D. A. 119; **Bosse,**[4] D. A. 122; Cissa, D. A. 123; **Clark,** D. A. 126; **Conlin,** D. A. 127; **Buchanan,** D. A. 147; **Carter,** D. A. 151; **Emswiler,** D. A. 152; Girton, D. A. 154; **Gladish,** D. A. 156; Hasler, D. A. 161; Bain, D. A. 164; Johnston, D. A. 172; Butcher, D. A. 178; Crosby, D. A. 183-184; **Fisher,** D. A. 185; **Flint,** D. A. 188; Ford, D. A. 191; McClain, D. A. 193; Hartzburg, D. A. 195-196; Herstine, D. A. 197-198; Hoke, D. A. 200; Galligton, D. A. 202; Cain, D. A. 204; King, D. A. 206; Milan, D. A. 207; Quinette, D. A. 209; Pruitt, D. A. 211).

The answers of three are not clear on whether they had seen or heard week-end publicity (Curtis, D. A. 129; Dodd, D. A. 130-131; Gowery, D. A. 160). Two veniremen who had seen articles were dismissed for talking with interested parties without testifying whether they had read papers over the week-end (Burnett, D. A. 176-177; Boyle, D. A. 207-209). Only six of the 40 affirmatively said they had not been exposed to articles or newscasts over the week-end, but had seen earlier articles (Black, D. A. 120; Duling, D. A. 133; **Embree,** D. A. 135; **Johnson,** D. A. 168; **Foster,** D. A. 175; and Jewell, D. A. 167). All

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[4] The veniremen whose names are in bold type served on the regular jury.

of the articles published in the area from which the jury was drawn were not available to defense counsel in the short time before trial, and were not introduced in evidence (D. A. 122, 123, 127, 151, 156). Specific information on to what had been read was not elicited by the Court (D. A. 127, 131, 193).

The Court below, in affirming the convictions, stated that "there is no question but what the material circulated through the press and other communication media contained statements prejudicial to the defendants" but that the record does not show that the "prejudicial material" was generated by the government. It further held that of the twelve jurymen who tried the case only five had seen the articles introduced in evidence containing the "prejudicial material" and that four of those disclaimed recalling what they had read. It also held that the trial Court had offered defendants an unlimited number of additional peremptory challenges and that defendants had declined to exercise them.

What occurred with respect to additional peremptory challenges is as follows (D. A. 189-190):

> "The Court: The Court in the pre trial conference with Counsel here, I believe it was April or May the entry is, the Court informed Counsel because of the multiple defendants that were involved in this case for good cause shown he would grant additional challenges peremptorily because of the multiple defendants and because of the desire of the Court to obtain a fair and impartial jury, I would want the defendants to reflect at this time and review the entire 12 jurors that are in the box and inform me if there are **any of them** that you would wish to implore the Court to exercise in addition to the ordinary challenge.
>
> "Mr. Davies: So far as my clients are concerned, there would be **none on those grounds.**

"The Court: **Understand, you are not surrendering the existing motion to the whole panel and those that read the newspaper.**

"Mr. Glazer: Could we have a moment?

"The Court: Yes. You just review them and if there are some you don't like the **color of their eyes or something,** let's get rid of them.

"Mr. Glazer: Just so the record is clear as far as the 12 are concerned, we do not want any additional peremptorial challenges for the reason from all the jurors we have examined, **they have, practically all of them read the newspaper and it would be impossible——**

"The Court: (Interposing) **We don't need to repeat that. You have your standing objection to that.**

"Mr. Shenker: Let the record show **we are renewing our** request to the **challenges** for cause **to the entire panel** for the same reasons we gave before.

"The Court: You understand the Court has recognized that. **I stand on that order,** but what I have this time afforded you is an opportunity to review your jurors. **If for any other ground you don't like the way their ears set in——**

"Mr. Glazer: (Interposing) The only other thing, your Honor, I would like in view of all the voir dire examination at this time, would like to renew our motion for continuance.

"The Court: At this time, before the jury is sworn to try this case, Counsel again renews their motion for a continuance heretofore heard.

"Mr. Glazer: And we are adding to that the testimony on the voir dire examination in support of those motions.

"The Court: All right.

"Mr. Glazer: Also our motion for a transfer.

"The Court: Let the record show there will be the same ruling of the Court as on the prior motion.

Does that make your record, gentlemen?'' (Emphasis added.)

Subsequent attempt to select alternate jurors unexposed to the newspaper publicity was even less successful than that of the regular jury. Of the twelve who were questioned about publicity (D. A. 191-212), only one had not read about the case on the prior week-end, and four stated that they had formed an opinion as to the defendants' guilt (D. A. 194, 196, 198, 203).

REASONS FOR GRANTING THE WRIT.

1. The evidence showed that the defendants did not register with the District Director of Internal Revenue nor obtain a wagering tax stamp as required by the Occupational Tax Laws (D. A. 221-237, 258-263, 265, 267). On November 29, 1957, federal agents raided their place of business pursuant to a search warrant charging certain of the defendants with conducting a wagering business without first registering and purchasing a stamp (G. A. 2181). The defendants were forthwith arrested, and subsequently indicted (D. A. 60-61, 66). Count 5 charged them with having violated the Occupational Tax Law by failing to register before engaging in the Wagering Business (D. A. 28).

Count 3 of the indictment charged that in October, 1957, defendants were engaged in the wagering business as co-partners, accepting wagers upon which the federal excise tax was due, that as co-partners they were required to file a wagering excise tax return on or before November 30, 1957 (i. e. after their arrest); that, with knowledge of the foregoing, defendants did wilfully attempt to evade the excise tax by failing to file a wagering excise tax return and to pay the tax, and by doing certain acts for the purpose of concealing the correct amount of the wagers accepted by them (D. A. 25-26). Count 4 contained simi-

lar charges for November with the date alleged for filing as December 31, 1957 (D. A. 26-28). Count 1, the conspiracy count, charged that defendants conspired to wilfully attempt to evade the excise tax on wagers, that the object of the conspiracy was to be accomplished by concealing the existence of the wagering business, by maintaining incorrect books and records, by engaging in the wagering business without first paying the wagering occupational tax and by failing to file a wagering excise tax return and pay the tax for September, October and November, 1957 (D. A. 18-23). Count 2 alleged the substantive charge for the month of September with the return date being October 31, 1957 (D. A. 23-24).

The gravamen of the three substantive felony counts and the conspiracy count is the failure to file wagering excise tax returns, and to pay the tax. Over objection, the Court admitted evidence that the defendants failed to file excise tax returns, even when due after their arrest (D. A. 226-235). The Court also refused to instruct the jury to disregard such evidence (G. A. 2031-2032). Since the Court also instructed the jury that if it found a defendant guilty on one count, it could consider such guilt in determining his intent on any other count (D. A. 1490), the evidence of their failure to file the returns after their arrest, permeated all counts of the indictment.

We submit that this procedure violated the defendants' Fifth Amendment rights against self-incrimination. Before the October and November wagering tax returns were due (being November 30 and December 31), defendants were actually charged with having, during those very months, engaged in the wagering business without having first registered for such occupation. It cannot be doubted that any action by the defendants with respect to those returns or the tax (not generally required of people), would have incriminated them under an existing charge. See **Irving v. California**, 347 U. S. 128, 130. Indeed, we also

believe that the defendants could not constitutionally be required to file the return for September, since it would have incriminated them concerning past acts, i. e. their failure to register before beginning the wagering business. **United States v. Ansoni**, 138 F. Supp. 451, 453-454 (N. D. Ill.). See **United States v. Kohringer**, 345 U. S. 22, 32; **Lewis v. United States**, 348 U. S. 419.

But certainly, once having arrested and charged them, the Government is precluded from proving crimes not yet fully consummated but which the defendants cannot avoid without affirmatively incriminating themselves on existing charges. Defendants cannot be placed in such a dilemma. Cf. **Jones v. United States**, 362 U. S. 257. The Government having chosen to make the arrest and charge, is precluded from proving their failure to act thereafter where such action would incriminate them.

United States v. Sullivan, 274 U. S. 259, holding that one may be required to file an income tax return, in inapposite, for that opinion recognizes that incriminating information as to past actions is privileged. Here, the mere filing of a wagering tax return or paying the tax would have incriminated the defendants.

The importance of the question here presented was pointed up by the recent decision of this Court in **Communist Party v. Subversive Activities Control Board**, ... U. S. ..., 81 S. Ct. 1357. The majority, finding the issue as to whether the order directing the Communist Party to register constituted compulsory self-incrimination to be premature, recognized that a registration statute requiring information concerning a past potential crime raised a difficult question as to the applicability of the Fifth Amendment. The four dissenting Justices held that the privilege of self-incrimination was violated by the order. The instant case is a stronger one for the privilege of silence. Clearly here self-incrimination was required after arrest; and, unlike the **Subversive Ac-**

tivities Control Board case, there can be no application of the corporation and organization principle of **Wilson v. United States**, 221 U. S. 361, and **United States v. White**, 322 U. S. 694.

Certainly the proof of the defendants' failure to speak and act as an element of a crime, where to have done so would have incriminated them in another past crime, is reversible error. Cf. **Grunewald v. United States**, 353 U. S. 391, 416; 77 S. Ct. 963, 980.

2. The erroneous interpretation placed on the record by the Court below effectively undermines **Marshall v. United States**, 360 U. S. 310. It cannot be doubted that defense counsel challenged all veniremen who had read articles about the case, which were, indeed, virtually the entire panel; and that they requested a continuance and a transfer (D. A. 87-90, 189-190). Moreover, it cannot be asserted on this record that a jury could have been selected of people who had not read or heard something about the case. What the Court below holds, as we understand it, is that, since the Court offered additional peremptory challenges (we do not understand it to have been unlimited) defendants should have undertaken to select a jury which asserted that it had not read or retained the prejudicial information contained in the particular articles introduced in evidence. We did not deem that practical or that it would assure the defendants a fair jury. Nor do we understand that we could have exercised peremptory challenges for that purpose.

There is no practical way of selecting a jury from a panel which has been exposed to prejudical newspaper publicity. For when the entire panel admits, as here, that they have read about a case which created as much community interest as this one, and defense counsel knows that prejudical publicity has been dispatched, there really is nothing he can do to assure an unbiased jury. For if he seeks the details of each jurors knowledge he not only

runs the risk that prejudicial information will be spread to perhaps some who have not read, **Coppedge v. United States**, 272 F. 2d 504, 508 (D. C. Cir.), but also he knows that those who speak most frankly are apt to be the fairest jurors. Regardless of frequent writings to the contrary, we know from experience that in a case of widespread interest and publicity such as this one, the jurors have read and retained. We have no doubt that each juror thought he could cast aside any bias, but **Marshall** teaches that such jurors cannot dissolve their minds of unconscious predisposition against the defendants. See also **Coppedge v. United States**, 272 F. 2d 504, 508 (D. C. Cir.); **United States v. Jacongilo**, 281 F. 2d 574, 576-577 (3 Cir.); **United States v. Alker**, 180 F. Supp. 661, 664 (E. D. Pa.); **Janko v. United States**, ... U. S. ...; 81 S. Ct. 1662; **Irving v. Dowd**, ... U. S. ..., 81 S. Ct. 1639.

We submit that, when a trial has not yet commenced, a defendant should not unnecessarily be required to have his liberty determined by a panel such as the one in the instant case. **Delaney v. United States**, 199 F. 2d 107 (1 Cir.); **Irving v. Dowd**, ... U. S. ..., 81 S. Ct. 1639. In a case such as this, the only way a defendant can get a fair trial is for the Court to exercise its discretion and transfer it to another district or grant a continuance.

Nor do we believe the Government was innocent of creating the publicity. Newspaper reporters, even from Indianapolis, were present at the raid (D. A. 62, 780-782) and the United States Attorney admitted that he talked to the press just before the trial commenced (D. A. 107-108). He also admitted this in oral argument in the Court below. See **Delaney v. United States**, supra; **Henslee v. United States**, 246 F. 2d 190 (5 Cir.); **Griffin v. United States**, 294 Fed. 437 (3 Cir.); **Briggs v. United States**, 221 F. 2d 636 (6 Cir.); **Harrison v. United States**, 200 Fed. 662 (6 Cir.). At least the defendants made a prima facie

case and the Government should have been required to come forward with the evidence. Cf. **Campbell v. United States**, 365 U. S. 10. See G. A. 65-67.

3. The Court below misapplied **Ingram v. United States**, 360 U. S. 672. It allows a conviction to stand upon jury findings that petitioners were merely partnership employees. (See instructions at D. A. 1543-1544; 1549-1551). It concludes that the fact that "Wyatt's occupational tax stamp was posted on the wall of the room" conveyed knowledge to the employees that their employers were evading the excise tax.

Liability for the excise tax is placed by 26 U. S. C. 4401 on the proprietor of a wagering business. Until the enactment of an amendment after the alleged violation in the instant case, an employee was not liable for the excise tax even if he received wagers for the wagering business. The fact that an employee knows that his employer has or does not have an occupational tax stamp does not give him knowledge that his employer is cheating the Government out of excise taxes or is not filing excise tax returns. The posting of defendant Wyatt's stamp does not supply this knowledge. Indeed, as we have pointed out, two of the excise tax returns involved were not required to be filed until after the raid which frustrated the gambling business. How could employees know that they would not be filed? The error in the convictions as to these two returns permeated all counts of the indictment because the Court instructed the jury that if it found a defendant guilty on one count of the indictment it could consider this guilt for the purpose of finding intent on any other count (D. A. 1490).

Nor was there other evidence sufficient to show that petitioners had knowledge that defendants Shaffer and Horwick would not file returns nor pay the tax. Most bets were taken by Shaffer and Horwick. Petitioner

Tamer registered in a Terre Haute Hotel on September 13 (D. A. 371-373, 389), but he left Terre Haute before the raid (D. A. 382, 391, 394). He rented a safe deposit box at a Terre Haute bank, which he entered only twice on October 15 and 31. When he cancelled it by mail on December 5, it contained nothing (D. A. 424, 428, 433-435) so clearly it had nothing in it after October 31. Petitioner Tamer was rarely seen at the Manor House Restaurant and it was questionable as to whether he was there in September (D. A. 492, 509-510, 523-524). No bettor witness testified that he placed a bet with petitioner Tamer. It is true that ten (10) of the 611 bet slips were in Tamer's handwriting (D. A. 1353-1355, 1384), but this proves no more than that petitioner Tamer was a clerk. The fact that he left the enterprise before the raid indicates that he was not a proprietor.

Petitioners Gordon and Share registered in a Terre Haute hotel on September 21 (D. A. 392-393, 378-379), a week after Shaffer and Horwick arrived (D. A. 371-373, 389). No bettor placed a bet with Gordon, and only a few with Share. There were 31 bet slips in Gordon's handwriting (D. A. 1339-1340; 1383-1384), and 84 in Share's (D. A. 1360-1361; 1385), but, again this only proves that they were clerks.

4. The search warrant stated that there was probable cause to believe that property was being used on the searched premises "in connection with the operation of a wagering business which [is] being used by persons . . . who have failed to register and pay the occupational-wagering tax for the fiscal year July 1, 1957 (A. 2181). The crimes upon which the warrant was based are the offenses of failing to register and pay the occupational-wagering tax, crimes of omission, not of commission. See **Spies v. United States**, 317 U. S. 492.

At least a substantial part of the items seized were not subject to seizure under any theory. They did not con-

stitute instrumentalities for the commission of any federal crime upon which the search warrant was based but were merely evidentiary materials which may not be seized either under the authority of a search warrant or during the course of a search incidental to an arrest. **Harris v. United States,** 331 U. S. 145, 154; **Abel v. United States,** 362 U. S. 217, 238. Certainly this is true of the summary records of amounts accrued on past bets, which were nothing more than accounting records.

In determining whether or not any item seized may be considered an instrumentality of the crime set forth in the search warrant it is necessary to consider the nature of the offense involved. The gamblers occupational tax law, as well as the excise tax law which was not alleged in the warrant, do not place a license upon gambling nor prohibit wagering. Rather they impose taxes and certain registration requirements prior to engaging in the gambling business. Implicit in **United States v. Kahringer,** 345 U. S. 22, which upheld the validity of the Act, is the premise that Congress did not intend to regulate the business of gambling as such.

What then are the instrumentalities of the crime? Certainly not property which may be considered to be the instrumentality of a state wagering crime. The question rather is whether property used in a gambling operation may be considered to be an instrumentality of the crime of failing to register under the occupational tax provisions of the act, or perhaps the excise tax provisions.

A person is required to register and pay the special occupational tax prior to engaging in the wagering business. Wagering creates a tax liability and a liability to register. It is not the gambling which is a violation of the law, but the failure to register and to pay the tax. We submit that any property used in the business of gambling is not used for the commission of the offense but is evidentiary of it. The property so used is merely

evidence of these past criminal acts of failing to register and pay the occupational tax and is not used for the commission of these acts. Even bet slips are not instrumentalities of violating the law but merely records or evidence of bets. Since no property is the means of committing such an offense, all property seized was merely evidentiary and not subject to seizure under the Fourth and Fifth Amendments.

In any event, there were some items which beyond doubt cannot be considered to be instruments of a federal crime, such as the records of accounts, check books, bank deposits book and bank statements. It is clear none of these items recorded any bets at the time taken and their possession violated no law. Their value in this case was as evidence. These would clearly be evidentiary material the seizure of which is forbidden under all circumstances. **Harris v. United States**, 331 U. S. 145, 154.

Moreover, the search warrant did not limit the seizure to items which could be considered to be intsrumentalities of crime. Rather it was a general warrant, calling for the seizure of all books and records as well as other items. It was, therefore, invalid as calling for a clear sweep seizure. **Kremen v. United States**, 353 U. S. 346; **Marcus v. Search Warrants**, U. S., 81 S. Ct. 1708. Further the agents did not execute the warrant in the manner required by **Miller v. United States**, 357 U. S. 301. They entered without giving prior notice of their authority and purpose.

5. Count V charged that defendants (engaged in the business of accepting wagers as co-partners of a wagering syndicate, knowing that they were required to pay a special occupational tax and to file a special tax return) "did wilfully and knowingly fail to register" with the District Director of Internal Revenue "in violation of Section 7203, Internal Revenue Code . . ." (D. A. 28-29).

See also instruction at D. A. 1549. Under this Count, each petitioner was given a one year consecutive sentence and fined $5,000.00 (D. A. 1582-1591).

Section 7272 of the Internal Revenue Code makes it a crime to fail to register with the Secretary or his delegate if required by the Internal Revenue Code, imposing a penalty of $50.00. It is broad enough to include any failure to register required by any provision of the Internal Revenue Code. The charging part of the indictment, that defendants knowingly failed to register, followed the language of Section 7272 and not the phrasing of Section 7203.

Section 7203 makes it a crime for any person, required to pay a tax or make a return, to wilfully fail to pay the tax or make the return. It authorizes a maximum penalty of one year imprisonment and a fine of $10,000.00. The citations of a statute in an indictment are immaterial in determining the nature of the charge; the allegations of fact determines the crime charged. **Williams v. United States**, 168 U. S. 382, 389. We submit that the sentence under this count was excessive and void.

CONCLUSION.

We respectfully submit that for the reasons stated hereinabove, the petition for writ of certiorari should be granted.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit.

September Term, 1960—April Session, 1961.

Nos. 12862-12867.

United States of America, Plaintiff-Appellee, v. Leo Shaffer et al., Defendants-Appellants.	Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

June 13, 1961

Before Schnackenberg, Castle and Major, Circuit Judges.

Castle, Circuit Judge. Defendants-appellants, Leo Shaffer, Philip Share, Irwin Gordon, James Tamer, Jules Horwick and Edgar M. Wyatt were convicted on all counts of a five count indictment. Each was sentenced to concurrent four year terms on the first four counts, to a one year consecutive term on Count V, and was fined $10,000.00 on Count I, $10,000.00 on Count II and $5,000 on Count V, making a total of five years imprisonment and $25,000.00 in fines.[1]

Count I of the indictment charges that defendants engaged in the business of accepting wagers as co-partners

[1] Joseph Jacobson and Charles L. Sumner were also named as defendants and convicted. Their prison sentences were suspended and they did not appeal.

in a wagering syndicate at Terre Haute, Indiana, and in violation of 18 U. S. C. A., § 371 conspired to wilfully attempt to evade and defeat a large part of the excise tax on wagers due and owing under Section 4401 of the Internal Revenue Code of 1954 for the months of September, October and November, 1957. Count II charges that defendants as co-partners in a wagering syndicate wilfully and knowingly attempted to evade and defeat the excise tax due on wagers totalling $326,315.20, accepted in the month of September, 1957, in violation of 26 U. S. C. A., § 7201. Counts III and IV charge identical violations pertaining to wagers accepted in November and December 1957 totalling $1,305,260.80 and $1,631,576.00, respectively. Count V charges that the defendants were engaged in the business of accepting wagers as co-partners of a wagering syndicate during the aforementioned period and that they violated 26 U. S. C. A., § 7203 by wilfully and knowingly failing to register as required by Section 4412 of the Internal Revenue Code of 1954.

Defendants in their appeals assert numerous errors which may be summarized as presenting the following basic contested issues:

(1) Whether or not the defendants were tried by a fair and impartial jury.

(2) Whether or not there was substantial evidence sufficient to sustain the convictions of the defendants.

(3) Whether or not there was a variance between the indictment and the case as it was submitted to the jury under the instructions.

(4) Whether or not there was prejudicial and reversible error in the admission of evidence or in instructing the jury.

(5) Whether or not prejudicial and reversible error resulted from the government's calling of witnesses who invoked the Fifth Amendment.

(6) Whether or not the sentence imposed on each defendant under Count V of the indictment is excessive.

On the issue of whether there is substantial evidence to support the convictions we must view the evidence in the light most favorable to the government. It is not for us to weigh the evidence nor reject inferences properly deducible therefrom. **Glasser v. United States**, 315 U. S. 60, 80; **United States v. Coduto**, 7 Cir., 284 F. 2d 464, cert. den., 365 U. S. 881; **United States v. Pinna**, 7 Cir., 229 F. 2d 216. With that rule in mind, we shall briefly refer to the facts and circumstances as developed by the proof.

From about the middle of September until November 30, 1957 a wager accepting business was conducted by telephone from a third-floor room in Terre Haute, Indiana, accessible from a street level entrance designated as 671½ Wabash Avenue. Most of the wagering was on the scores of college and professional football games. The bets were in sizable amounts, many ranging from $1,000.00 to $10,000.00, and totaled over three million dollars. The wagers were with bettors scattered throughout the United States from coast to coast and were received by long distance telephone calls.

In August of 1957 defendant Edgar M. Wyatt, a resident of Terre Haute, rented the room for a term of four months commencing September 1, arranged for the installation of eight telephones operating in banks of four with one unlisted number assigned to each bank, and for the receipt of sports wire service. He deposited $5,000.00 to cover estimated long distance tolls for a thirty day period and paid in advance for fifteen days' billing on the wire service.

About the middle of September the other defendants arrived in Terre Haute from various other cities. Shaffer, Jacobson, and Tamer checked in simultaneously at a local

hotel where Wyatt had previously reserved a suite of adjoining rooms for them. Horwick registered at a nearby hotel but a few days later removed to the hotel where the others were staying and occupied a room close to the suite. Share and Gordon arrived about a week later and Sumner shortly thereafter. Sumner was assigned to the suite occupied by Shaffer and Jacobson. The hotel was about two hundred feet from the entrance at 671½ Wabash Avenue.

All of the defendants were observed frequently in a restaurant adjacent to the entrance to the room and during periods when the latter premises was under surveillance were observed entering at various times in the morning, each using his own key to open the street level door which was always kept locked. The defendants usually left the premises together each evening. During the two and one-half month period involved over five thousand long distance telephone charges were made to the telephones.

More than fifty witnesses testified to placing bets by telephone on calls to the two unlisted numbers assigned to the telephones. Some asked for one of the individual defendants when they called, others placed their bets with whoever answered the phone or with someone to whom the defendant called transferred the call. In a number of instances bettors who had lost were instructed to remit the cash by registered mail to E. M. Wyatt or E., M. Wyatt & Company although they knew neither and had placed their bet with one of the defendants other than Wyatt. One bettor on inquiring whether he was betting with defendant Shaffer was informed "Yes, with his company".

On November 29, 1957 the room was entered pursuant to a search warrant at approximately 1:30 P. M. Horwick was leaving the premises. The remaining defendants, except Tamer, were in the room, three engaged in telephone conversations. Among other items, a record of

bettor accounts receivable and payable was found on the premises. It reflects the net amount due from or payable to each bettor. There is no indication that the amount is due to or payable by any particular one of the defendants. Also found were betting slips recording wagers in the handwriting of all six defendants and schedules on which a running balance of the gross amount wagered on each game yet to be played was recorded. These amounts were identical with the total of the betting slips on the particular game. Where a game had been played there was an entry of the net gain or loss on that game.

None of the defendants had filed the special tax return and application for registry-wagering or a monthly excise tax return, as partners or members of any group or syndicate. With the exception of Wyatt, none of the defendants registered as being engaged in the business of accepting wagers during the period in question. In August of 1957 Wyatt had withdrawn from a partnership, known as the Clover Club, engaged in the business of accepting wagers at Terre Haute. He had previously signed and filed the special tax returns and applications for registry-wagering on behalf of that partnership which listed and identified the partners as required by law and pertinent Treasury Regulation. On September 12, 1957 Wyatt filed a special tax return and application for registry-wagering at 671½ Wabash Avenue listing himself as the owner and stating he was in the business of accepting wagers on his own account. He filed monthly excise tax returns for the months of September, October and November, 1957. They were signed "E. M. Wyatt, owner" and in the aggregate covered the tax due on wagers in the amount of $5,625.00.

We have not attempted to set forth the evidence in detail but from a careful study of the record we are convinced that there was ample and substantial basis for the jury to conclude that the defendants conspired to utilize the registration and the monthly tax returns of Wyatt as

a front to mask the magnitude of the wagering operation they actually conducted with the plan and design of evading the substantial tax actually due. The defendants' contention that the evidence does not support a conclusion that the operation conducted at 671½ Wabash Avenue was a partnership[2] or syndicate operation is without merit.

The defendants complain of certain of the court's instructions asserting that they are confusing and repugnant. Much of defendants' argument in this respect is directed to features which were not made the basis of objections presented to the trial court and which arise only if the specific language is isolated and considered out of context. We have examined the instructions and it is our opinion that when considered in their entirety they contain no reversible error. In fact their detail evidences the exercise of meticulous care in informing the jury of the extent of the government's burden under the indictment. And the instruction given on guilt as an aider or abettor correctly states the law. The District Court did not err in giving that instruction nor the instructions it gave on conspiracy.

There is no evidence here that the acts of concealment were for the purpose of concealing prior criminal acts and the instructions tendered on such theory were properly refused. **United States v. Clancy**, 7 Cir., 276 F. 2d 617.[3] Nor was there a basis for the lesser included offense instructions requested by defendants. Here it was possible to have committed the greater offense charged without having committed the lesser (evasion of the occupational tax on wagering in violation of 26 U. S. C. A.,

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[2] 26 U. S. C. A., § 7701 defines "partnership" as including a "syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation or venture is carried on. . . ."

[3] Reversed on other grounds, 365 U. S. 312.

(7262). The instructions were properly refused. Cf. **James v. United States**, 9 Cir., 238 F. 2d 681; Rule 31 (c), Federal Rules of Criminal Procedure, 18 U. S. C. A.

Defendants claim there is a variance between the indictment and the instructions under which the case was submitted to the jury. It is argued that a fatal variance resulted from the instructions permitting conviction of all defendants if any two or more were members of the specific partnership charged in the indictment and the remaining defendants were aiders and abettors. We do not agree. The elimination of one or more of the defendants as a member of the wagering syndicate does not eliminate the existence of the syndicate. And it is not necessary that aiders and abettors be charged as such in the indictment. **United States v. Monticello**, 3 Cir., 264 F. 2d 47; **Mays v. United States**, 8 Cir., 261 F. 2d 662. There was no variance and **Stirone v. United States**, 361 U. S. 212, relied upon by defendants is without application.

Defendants' reliance upon **Ingram v. United States**, 360 U. S. 672, is misplaced. **Ingram** involved convictions of conspiracy to evade and defeat payment of the wagering excise tax but the convictions which were reversed were those of two employees without proprietary interest in the operation and the reversals were based on a lack of evidence of any knowledge of the employers' tax liability. Evidence of knowledge was not lacking in the instant case. Wyatt's occupational tax stamp was posted on the wall of the room.

The defendants contend that the District Court committed reversible error in the admission of testimony and exhibits concerning the previous partnership relationship of Wyatt in the Clover Club operation and the special tax returns and applications for registry-wagering executed and filed by him which listed the partners in that operation. At the time of its admission this evidence was limited to defendant Wyatt and it was admissible to show his

knowledge of the wagering-registry requirements of the Internal Revenue Code. We perceive no error in this connection. Nor was it a basis for a mistrial or severance.

It is urged that the court erred in permitting a government witness, whose qualifications are not in dispute, to testify as to his computation of the gross amount of wagers reflected in the records found in the room. The hypothetical questions asked assumed that the wagering operation was a co-partnership otherwise their answers simply represented a computation of the amount of wagers from records in evidence. The court carefully instructed the jury that it was not to take for granted that the statements contained in the hypothetical questions are true but should carefully scrutinize the evidence to so determine and give no weight to opinions based on any material statement found not to be true. The court did not err in the admission of this testimony.

Defendants claim that the court erred in admitting into evidence, and in failing to strike, testimony that the defendants other than Wyatt failed to file excise tax returns. But this evidence clearly had a relevant and material bearing on the case. Evidence tending to negate that defendants were operating as individuals and not attempting to evade any tax due was admissible. And there is no merit to the contention that defendants' privilege against self-incrimination was violated by the admission of such testimony.

The joint motion of certain of the defendants to quash the search warrant and suppress evidence was properly overruled. An examination of the face of the warrant shows that it is completely adequate and states sufficient grounds for its issuance. And, contrary to defendants' contentions, the items seized at the time of the search and later admitted in evidence were all instrumentalities of the crime. The betting slips, schedules of gross amounts wagered on each game, record of accounts receivable and

payable and other records were all items utilized in the continued operation of the venture and instrumentalities of the crime charged. **United States v. Lefkowitz**, 285 U. S. 452; **Marron v. United States**, 275 U. S. 192, 199; **Merritt v. United States**, 6 Cir., 249 F. 2d 19.

During the trial the government called over sixty witnesses in corroboration of the betting records and toll slips. Nine of these invoked the Fifth Amendment. Six of the nine had claimed the privilege before the grand jury. The error, if any, in calling such witnesses is cured by the cautionary instruction given by the District Court. **United States v. Magin**, 7 Cir., 280 F. 2d 74, 79.

Count V of the indictment charged a violation of 26 U.S.C.A. §7203. The punishment imposed was within that authorized by that statute and on the record and under the circumstances here involved it was not excessive. **United States v. Coduto**, 7 Cir., 284 F. 2d 464, 469, cert. den., 365 U. S. 881; **United States v. Chicago Professional Schools, Inc., et al.**, 7 Cir., concurring opinion, April 26, 1961, ... F. 2d ... . Defendants' contention that Count V charges a violation of 26 U.S.C.A. §7272 (which imposes "a penalty of $50") rather than of §7203 is without substance.

Defendants assert that because of prejudicial newspaper, radio and television publicity occurring on the eve of the trial they were not afforded a trial by an impartial jury. The trial commenced on a Monday. The publicity in question occurred during the previous week-end. There is no question but what the material circulated through the press and other communication media contained statements prejudicial to the defendants, characterizing some as professional gamblers, others as ex-convicts, and containing representations of prior criminal activities and convictions. Although defendants contend that the pre-trial publicity was generated at least in part by the government the

record does not support them in this contention in so far as any of the prejudicial material is concerned.

On the morning of the trial defendants filed a motion for an indefinite continuance followed by a motion that the case be transferred to another district, both of which were overruled. The District Court carefully interrogated each prospective juror on voir dire examination as to whether or not the newspaper articles, radio broadcasts or telecasts had come to his attention and requested the parties to submit any additional questions which either party felt should be propounded to the jurors. Defendants submitted none.

Of the twelve jurymen who tried the case, only five had heard of the case through the newspaper articles in question. Four of these could not recall what they had read in the articles. One just saw the headlines and did not recall the article itself. Each of the twelve jurors stated that he had formed no opinion as to the guilt or innocence of the defendants. None had any opinion concerning any of the facts of the case because of anything they had read or heard about it and all twelve stated that they would rely entirely upon the evidence to be heard in arriving at a verdict. Following the selection of the twelfth juror but before the jury was accepted or sworn the court gave the defendants an unlimited number of additional peremptory challenges. Defendants declined to exercise the unlimited additional peremptory challenges offered and accepted the entire jury panel, subject to their standing objection for cause. During the voir dire examination defendants had requested that all jurors who had heard of the case through the pre-trial publicity here in question be excused for cause.

Defendants rely heavily upon **Marshall v. United States**, 360 U. S. 310 as sustaining their contention that they were not afforded a trial by a fair and impartial jury

and that the case should be reversed and a new trial awarded. In our opinion the defendants' refusal to exercise the peremptory challenges offered them precludes any application of **Marshall**. In **Marshall** the prejudicial newspaper articles were read by jurors during the trial of the case and there was no opportunity to secure others in their place. The record in this case does not establish that it was impossible to secure jurors who had not seen or heard the publicity in question. Seven of the jurors who tried the case had not and at the time defendants refused the additional peremptory challenges and accepted the jury forty veniremen had not yet been called or interrogated on voir dire examination. In **Marshall** it was recognized that the trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles and that each case must turn on its special facts. On the record before us we find no reversible error on this issue.

We have considered all other issues raised by the defendants but find the arguments advanced in support thereof to be without merit. We have not made specific reference to many of the authorities cited and analyzed in the briefs but we have considered them and each of the arguments advanced by defendants in support of their position on the issues and discussed those issues we deemed necessary.

We conclude that the defendants were accorded a fair and impartial trial free from reversible error. Each of the judgments of the District Court is affirmed.

Affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of
Appeals for the Seventh Circuit.

United States Court of Appeals
For the Seventh Circuit,
Chicago 10, Illinois.

Tuesday, June 13, 1961.

Before
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. J. Earl Major, Circuit Judge.

United States of America,
Plaintiff-Appellee,

Nos. 12862 thru 12867

vs.

Leo Shaffer, Philip Share, Irwin Gordon, James Tamer, Jules Horwick, Edgar M. Wyatt,
Defendants-Appellants.

} Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, Affirmed, in accordance with the opinion of this Court filed this day.

United States Court of Appeals
For the Seventh Circuit,
Chicago 10, Illinois.

Wednesday, August 2, 1961

Before
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.

United States of America,
Plaintiff-Appellee,
Nos. 12862 through 12867
vs.
Leo Shaffer et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

It Is Ordered by the Court that the petition for a rehearing of this cause, filed herein on June 27, 1961, on behalf of defendants-appellants Leo Shaffer, Jules Horwick and Edgar M. Wyatt, and the petition for a rehearing filed herein on June 27, 1961, on behalf of defendants-appellants Philip Share, Irvin Gordon and James Tanner, be and the same are hereby, Denied.

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Nos. 378 and 379

In the Supreme Court of the United States

OCTOBER TERM, 1961

LEO SHAFFER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PHILIP SHARE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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In the Supreme Court of the United States

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No. 378

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 378, pp. 49–60) is reported at 291 F. 2d 689.

JURISDICTION

The judgment of the court of appeals was entered June 13, 1961 (Pet. No. 378, p. 61). Petitions for rehearing were denied on August 2, 1961 (Pet. No.

378, p. 62). The petitions for writs of certiorari were filed on September 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for willfully attempting to evade wagering taxes by, *inter alia,* failing to file returns, the government is precluded from showing failure to file on the ground that, if such returns had been filed, they would have been incriminatory on a charge of prior failure to register.

2. Whether pre-trial publicity denied petitioners a fair trial.

3. Whether the evidence establishes that, in carrying on the business of accepting wagers, the petitioners were partners.

4. Whether the instructions to the jury were proper.

5. Whether the gambling paraphernalia seized pursuant to a search warrant were instrumentalities of the federal crime of engaging in the business of accepting wagers without having registered and paid the wagering occupational tax.

6. Whether, having been charged with and convicted of the misdemeanor of willfully failing to register, the petitioners should have been sentenced under the lesser penalty provided for merely failing to register.

7. Whether evidence that petitioners had failed to file wagering tax returns either at their places of residence or at Baltimore, Md., was properly admitted.

8. Whether an accountant, who testified as to a compilation of the total wagers received by petition-

ers, was properly asked hypothetical questions which assumed that the petitioners were partners.

STATUTES AND REGULATION INVOLVED

Internal Revenue Code of 1954:

Section 7203

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Section 7272 [68A Stat. 866]

(a) IN GENERAL.—Any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

* * * * *

Section 7701

(a) When used in this title, * * *—

(1) PERSON.—The term "person" shall be construed to mean and include an individual, * * * partnership, association, company * * *.

(2) PARTNERSHIP AND PARTNER.—The term "partnership" includes a syndicate, group, pool,

joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on * * *.

* * * * *

Treasury Regulations 132, Section 325.50 Registry, Return, and Payment of Tax:

(a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by * * * the Internal Revenue Code * * * and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11–C. The return shall be filed with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Baltimore, Md. * * *.

* * * * *

STATEMENT

Petitioners were convicted [1] by a jury in the United States District Court for the Southern District of Indiana on all five counts of an indictment charging

[1] Joseph Jacobson and Charles L. Sumner were also convicted but did not appeal.

violations of the wagering tax provisions of the Internal Revenue Code of 1954. Count I charged petitioners with conspiring to attempt to evade the excise tax on wagering (Govt. 2205–2209).[2] Counts II, III and IV, covering September, October and November of 1957, respectively, charged petitioners, as copartners in a wagering syndicate, with willfully attempting to evade the wagering excise tax by failing to file returns and pay the required tax, in violation of 26 U.S.C. 7201 (Govt. 2209–2214). Count V charged petitioners with willfully failing to register (as required by 26 U.S.C. 4412), in violation of 26 U.S.C. 7203 (Govt. 2214–2215). Each petitioner was sentenced to concurrent four-year imprisonment terms on the first four counts; to a one-year consecutive imprisonment term on Count V; and to fines of $10,000 on Count I, $10,000 on Count II and $5,000 on Count V (A. 1582–1591).

The evidence may be summarized as follows:

Petitioner Wyatt leased the third floor of a business building in Terre Haute, Indiana, from September 1, 1957, paying $1,000 in advance and saying he wanted to "put in a sports service" for "[t]hree or four months" (A. 398–404). The premises could be reached by a separate street entrance marked "671½" Wabash Avenue, located between a shoe store and a restaurant, and then through two inner doors on the second and third floors, respec-

[2] The three-volume blue government appendix will be cited with the prefix "Govt." The volume containing the government's exhibits, which are in numerical order, will be cited by exhibit number, rather than by page. The petitioners' two-volume yellow appendix will be cited with the prefix "A".

tively (A. 675–676, 709, 803; Govt. 778, 812–814). Wyatt also arranged for the installation of eight telephones with unpublished numbers in two banks of four telephones each, so arranged that the telephones in each bank would ring in rotation if the first number were busy. Wyatt deposited $5,000 for estimated long distance toll charges and requested five credit cards. He told the manager of the telephone company to classify the business as "sports service" but later changed the classification to "none" (A. 314–329, 350–353, Ex. 26). Wyatt also obtained from Western Union a sports ticker tape service which was not to be used for gambling purposes (A. 407–409, 412–415, Ex. 39).

On September 12, 1957, Wyatt registered with the Internal Revenue Service, and paid the occupational tax, to accept wagers at 671½ Wabash Avenue "on his own account", stating that he had no employees or agents (A. 293–303, Ex. 1).[3]

The other defendants arrived in Terre Haute between September 13 and September 26, 1957, and registered in two hotels. Wyatt had reserved a suite of three adjoining rooms at one nearby hotel (A. 366–367). Petitioner Leo Shaffer registered as being from Indianapolis (Ex. 29); petitioner James Tamer from Miami, Florida (Exs. 31, 35); petitioner Jules Horwick from Chicago, Illinois (Ex. 32); defendant Joseph Jacobson from Indianapolis (Ex. 30); petitioner Philip Share from Sherman Oaks, California (Ex. 37); defendant Charles L. Sumner from Indianapolis

[3] The occupational tax stamp was displayed on the wall when the agents raided the premises (A. 776).

(Ex. 33) and petitioner Irwin Gordon from Las Vegas, Nevada (Ex. 36).

Petitioners Shaffer and Horwick contracted with William Kaplan of Chicago to mail their customers a weekly sports forecast. Mr. Kaplan had been in the sports service business as a handicapper since 1929, and was acquainted with all the petitioners except Wyatt. Shaffer told Kaplan to carry his account under the name of "E. M. Wyatt" (A. 1149–1152, 1167–1174).

During the following weeks, government agents kept the petitioners and the premises at 671½ Wabash Avenue under surveillance (A. 568–660, 695–696). All petitioners entered and left the premises, using a key to the entrance. The only other person seen entering was a janitor (A. 568–660, 691). Most registered mail was delivered by leaving it at the adjoining restaurant (A. 450, 468, 590).

On November 29, 1957, acting under a search warrant, the government agents raided the premises (A. 695–710). They found six of the defendants seated around a table, answering the telephones (A. 709). There was a large board in the center of the table containing schedules of football games; the room also contained various paraphernalia used in wagering, such as pencils, pads around the telephones, and betting slips (A. 710). The agents seized this material (A. 712–769).

More than 50 bettors from all parts of the United States testified they placed wagers by telephoning the special telephone numbers in Terre Haute. (See list in petition for Shaffer *et al.*, pp. 9–11; see also

petition of Share *et al.*, p. 6).[4] Betting slips found at the time of the raid, some of which were identified by handwriting experts as in the handwriting of the petitioners, totaled over one million dollars (A. 1289–1308, Ex. 136, and see analysis, Govt. 2225–2238), and related primarily to football games to be played on five dates. Also found at the time of the raid was a record of accounts receivable and payable, covering more than 200 bettors (Exs. 137, 138). The net amount there shown as due and payable, which may be substantially less than the total gross wagers upon which the tax is computed, was $1,844,707 (A. 1324).

From approximately September 13 to November 29, 1957, more than 5,000 telephone calls were charged to the premises. No figure is available to show all the calls (including those not charged to the special numbers) made and received. The total telephone expense during this period was $9,784.49 (A. 334–339).

Petitioner Wyatt filed monthly wagering tax returns showing gross wagers of $620 for September (Ex. 2), $2,005 for October (Ex. 3), and $3,000 for November (Ex. 4). None of the other petitioners filed a registration or a wagering tax return in Indiana, or in the district where he resides, or in Baltimore, Maryland (the place of filing if one has no office or residence in the United States, see Treasury Regu-

[4] Since petitioners are in two groups, they will be referred to by the surname of the first petitioner in each petition, *i.e.*, the petition filed by Shaffer, Horwick and Wyatt will be referred to as the petition for Shaffer *et al.*, and the petition filed by Share, Gordon and Tamer will be referred to as the petition for Share *et al.*

lations 132, Sections 325.30 and 325.50) (A. 221–238, 257–267).

The court of appeals unanimously affirmed the convictions, stating (Shaffer *et al.* Pet., p. 54):

> * * * from a careful study of the record we are convinced that there was ample and substantial basis for the jury to conclude that the defendants conspired to utilize the registration and the monthly tax returns of Wyatt as a front to mask the magnitude of the wagering operation they actually conducted with the plan and design of evading the substantial tax actually due.

ARGUMENT

1. The petitioners Share *et al.* contend (Pet. 13–16) that the admission of evidence that they failed to file monthly wagering excise tax returns violated their privilege against self incrimination.[5] Their argument is that, since it is a federal crime to engage in the business of accepting wagers without having registered and paid the occupational tax, the filing of returns showing gross receipts from wagering would have shown that they engaged in such business at a time when they were not registered. The duty to file returns is, however, an inseparable part of the duty to pay taxes. Thus, petitioners in effect are arguing that the failure to pay one tax thereafter gave them an immunity for failing to pay other taxes when due.

[5] Petitioners emphasize that two of the three returns involved were due after arrest. However, the failure to file involved in Count II took place before arrest, and the sentence under that count was concurrent with sentences on the two other counts based on failure to file.

In a prosecution for evading wagering taxes, it was manifestly incumbent on the government to show that the taxes had not been paid. Those taxes were due whether the business was legal or illegal. *United States* v. *Sanchez,* 340 U.S. 42 (marihuana); *United States* v. *Doremus,* 249 U.S. 86 (narcotics); *Sonzinsky* v. *United States,* 300 U.S. 506 (firearms); *License Tax Cases,* 5 Wall. 462 (lotteries). Payment of taxes on wagers, after failing to register, would be no more incriminatory than would be the payment of taxes on liquor by an unlicensed dealer during prohibition—the situation before the Court in *Stafoff* v. *United States,* 260 U.S. 477, where the prosecution was upheld. Similarly, petitioners' failure to register their business did not excuse their failure to file returns and pay the taxes on the wagers which they took. When they went into the gambling business, they knew that they were going into a business subject to taxation. *Lewis* v. *United States,* 348 U.S. 419, 422–423, and see *United States* v. *Kahriger,* 345 U.S. 22, 32. Since Congress made their failure to pay those taxes subject to prosecution, the government was entitled to introduce proof of such failure to pay.

2. The claim of petitioners Share *et al.* that they could not obtain a fair trial because of pre-trial publicity (Pet. 16–18) is necessarily limited to publicity that occurred prior to the *voir dire* examination of the veniremen, for despite the length of this trial (June 24, 1959 to July 30, 1959), the jury was sequestered for the entire time (Govt. 319–322). By generalizing from the fact that there was pre-trial publicity which some jurors had seen, petitioners

argue that an impartial jury could not have been selected. The record, however, shows the contrary.

The trial judge conducted a searching and full examination of the veniremen which took two days (Govt. 88–317; A. 115–211). Some veniremen had never heard of the case (*e.g.*, Mr. Beck, A. 115, 117; Mr. Bruner, Govt. 129; alternate juror Mr. Myer, A. 201). Of the jurors who tried this case, only five had seen the specific articles which petitioners claim were prejudicial (Clark, A. 126; Buchanan, A. 147–148; Emswiler, A. 152; Fisher, A. 185; and Flint, A. 188), and none of these could recall all they had read (A. 126, 148, 153, 188). One juror had seen only the headlines (A. 185). Any prospective juror who suggested that he might have an opinion as to the guilt or innocence of petitioners was rejected (A. 131–133, 144, 165, 194, 196, 198, 202–203; Govt. 207–209). Not one petitioner exercised a peremptory challenge in the selection of alternate jurors (Govt. 317).

As this Court has held, in the determination whether there was "prejudice resulting from the reading by jurors of news articles concerning the trial * * * each case must turn on its special facts." *Marshall* v. *United States*, 360 U.S. 310, 312. The only showing made here was that jurors had heard of, and read about, the case. There was no showing of actual or probable prejudice or bias by the jurors. "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial * * *." Mr. Justice Holmes in *Holt* v. *United States*, 218 U.S. 245, 251. The ex-

tensive *voir dire* examination fully protected petitioners' rights to an impartial jury.[6]

3. The argument of petitioners Shaffer *et al.* that the government did not prove the partnership as charged in the indictment (Pet. 18–23) is refuted by the record.

Count I charged the individual petitioners with conspiring to violate the wagering laws (A. 18–19). Among the means alleged to accomplish this conspiracy was conducting a wagering business "as co-partners in a wagering syndicate". Counts II through IV charged that the individual petitioners "were engaged in a business of accepting wagers as co-partners in a wagering syndicate" and "the said defendants * * * did wilfully and knowingly attempt to evade and defeat the said excise tax * * *" (A. 23–24, 25, 26–27). Count V charged that petitioners were in the business of accepting wagers "as co-partners of a wagering syndicate" and "that said defendants * * * did wilfully and knowingly fail to register." (A. 28).

Petitioners' argument (Pet. 31) that the conviction can be supported only if the government proved a single partnership of all eight defendants is untenable. In describing the defendants as "co-partners," the indictment adopted the statutory definition of those terms. The statute (26 U.S.C. 7701) states that "[t]he term 'person' shall be construed to mean

[6] Petitioners' doubt that the government was innocent of creating the publicity (Pet. 17) is not justified by the record. The government denied during the trial that it was responsible for the publicity (A. 106). In any event, the relevant inquiry was the attitude of the jurors.

and include * * * partnership" and that "[t]he term 'partnership' includes a syndicate, group, pool * * * through or by means of which any business * * * or venture is carried on * * *." Thus, to prove a partnership under this definition it was not necessary to show all of the attributes of a partnership at common law; it was sufficient to prove a common enterprise by more than one person.

The evidence was clearly sufficient to show such a venture. For example, Govt. Ex. 139 (following Govt. 2240) graphically shows that although all petitioners accepted wagers (see partial analysis, Govt. 2225–2238), the winnings or losses on completed games were computed as a whole, thus indicating one indivisible syndicate operation.

Under the instructions, the court required two or more defendants to be found guilty as principals before others could be guilty as aiders and abettors (Instruction No. 41, A. 1549). Whether any particular petitioner was a member of the partnership was a question for the jury (see Instruction 35, A. 1542). The trial judge carefully instructed the jury that each petitioner had to be proved guilty of all the elements of the offense on each count (Instruction No. 35, A. 1541).

The foregoing discussion answers the contention of all the petitioners that the court erred in instructing on aiding and abetting (Share Pet. 18; Shaffer Pet. 32–35). So long as two or more defendants were partners, as the judge charged they must be before there could be any conviction, the others could have been properly convicted as aiders and abettors. For

the others, if not partners, at least knowingly aided the syndicate. Instruction No. 41 (A. 1549–1550) and other references to aiding and abetting in the instructions were therefore correct. *Nye & Nissen* v. *United States,* 336 U.S. 613, 618–619; *Direct Sales Co.* v. *United States,* 319 U.S. 703, 709.

4. A. The petitioners Share *et al.* claim the instructions to the jury misapplied *Ingram* v. *United States,* 360 U.S. 672, and permitted their conviction as "merely partnership employees" (Pet. 18–19).[7] But neither the instructions, nor the facts of this case, support their contention.

The trial judge specifically instructed the jury that if any defendant was not a partner and was "merely an employee of the alleged partnership * * * you must acquit such defendant of all Five (5) Counts of the Indictment; providing such employee was not an aider or abettor as defined in Instruction No. 41" (Instruction No. 36, A. 1543–1544). He also instructed that any defendant who did not have knowledge of the wagering tax law requirements should be acquitted (A. 1545–1546).

The evidence supports the conviction under this charge. Unlike *Ingram,* there was here no conceal-

[7] As petitioners themselves note, this issue is of limited significance in view of the change in the statute in 1958, subsequent to this indictment. Section 4401 of Title 26 of the Code was amended by the Excise Tax Technical Changes Act of 1958, by adding the following sentence, 72 Stat. 1304: "Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him."

ment of the wagering operation for local purposes, since Wyatt had registered for the specific location involved (Ex. 1). Nor were the petitioners mere "employees". They had come to Terre Haute from different parts of the country, and were not there just to answer the telephone, but to obtain wagers for the syndicate. While there was evidence that the petitioners had some "pick-up" men who merely picked up money for the syndicate (A. 1241–1243), the evidence showed that each of the petitioners directly accepted wagers (see also discussion of the partnership, *supra,* pp. 12–14). Nor is there any question of the petitioners' knowledge of what was being done, since they were daily occupying a room with Wyatt, who had his occupational tax stamp prominently posted on the wall (A. 776).

B. The petitioners Shaffer *et al.* complain of the use of "and/or" in certain instructions (Pet. 42–43). Despite numerous other objections to instructions (A. 1442–1453, 1559–1577), petitioners failed to object to this at the trial. They thus are in no position to raise the issue now. See Rule 30, F.R. Crim. P. In any event, their contention is without merit. The term is readily understandable by jurors.

C. Petitioners Shaffer *et al.* complain generally that the number and length of the instructions confused the jury (Pet. 24–37), although they concede that the instructions correctly stated the law. This type of case, however, requires careful and meticulous instructions—as petitioners themselves recognized when they tendered about 100 proposed instructions to the trial judge (Govt. 2031–2069, A. 1434).

5. Petitioners Share *et al.* contend that the bank account records and the records of accounts seized under a search warrant were not instrumentalities of the federal crime of failing to register and pay the wagering occupational tax (Pet. 19–21). They assert that all gambling property "is not used for the commission of the offense but is evidentiary of it" (Pet. 20). The crime, however, is not merely failure to register, but the carrying on of the business of accepting wagers without having registered. Thus, an essential element of the offense is the carrying on of a wagering business; and the normal paraphernalia of a gambling operation are instrumentalities used in so doing. Since a book of accounts is necessary to the effective functioning of this business, the book was properly seized as an instrument used in committing the crime. The bank records were so closely related to the conduct of the business as to make them part of the equipment used in committing the crime, and thus subject to seizure. *Marron* v. *United States,* 275 U.S. 192, 199.

6. The claim of petitioners Share *et al.* that their sentence on Count V was excessive (Pet. 21–22) is frivolous.

Petitioners were sentenced to one year imprisonment and a $5,000 fine on Count V under 26 U.S.C. 7203, which provides that anyone "who willfully fails to pay such * * * tax, make such return * * * or supply such information * * * shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than

1 year, or both * * *". Count V charged that each petitioner "did wilfully and knowingly fail to register * * * [i]n violation of Section 7203 * * *" (A. 28). Since petitioners were charged with and convicted of a "willful" violation they were properly sentenced under Section 7203. They were not required to be sentenced under Section 7272 which provides a $50 penalty for mere (*i.e.*, nonwillful) failure to register.

7. The petitioners Shaffer *et al.* challenge the admission of government testimony that none of the petitioners filed the required tax returns in his home district or in Baltimore, Maryland (Pet. 37–42). Such proof was relevant and admissible.

The indictment charged that one of the means used in attempting to evade the tax was that the petitioners failed to file or pay the tax. It also charged petitioners with willfully failing to register. Sections 325.30 and 325.50 of Treasury Regulations 132 provide that, if the taxpayer has no office or principal place of business, the return shall be filed in the district of his residence, or, if he has no residence, with the collector of internal revenue at Baltimore, Maryland. It therefore was proper for the government, in proving a willful violation, to show not only that petitioners had failed to register at the place where they did business, but that they did not file at any other possible place.

8. Petitioners Shaffer *et al.* contend that it was improper to permit an expert accountant witness, in answering hypothetical questions about the total wagers received, to assume that petitioners were copartners

(Pet. 43–46). There is no merit in this contention. The testimony was relevant as an aid to the jury in computing significant totals of many hundreds of figures. These totals had no significance if the petitioners accepted the wagers as individuals rather than as members of a pool, syndicate or partnership. Since there was sufficient evidence to show the partnership (*supra*, p. 13), the questions were proper. Any danger that the questions might be misconstrued by the jury was eliminated when the court instructed the jury not to accept statements contained in the hypothetical questions unless their truth was shown by the underlying evidence (A. 1486–1487).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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SEPTEMBER 1961.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 379.

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF.

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REPLY BRIEF.

ARGUMENT.

1. The Government misconceives, and only responds to a minor premise of, this contention (Br. Op. 9-10). On November 29, 1957, the defendants were arrested and charged with having conducted a wagering business without first registering and purchasing a stamp, in violation of the Occupational Tax Laws. Thereafter, they were further charged with having wilfully failed, after their arrest and while the Occupational Tax charges were pend-

ing, to file excise tax returns and to pay the excise tax on the very business operations concerning which they were already charged. Obviously, had they filed the excise tax returns and paid the excise taxes, they would have incriminated themselves on pending charges. Moreover, the Government had seized and possessed their records, making it impossible to file the returns.

It is our contention that the Government, having chosen to make the arrest and charges before the excise taxes were due, is precluded from bringing **criminal** charges predicated upon subsequent inaction, where affirmative action would have incriminated the defendants on pending charges.

The proof of their failure to make the returns and pay the tax after arrest was clearly prejudicial as to all counts of the indictment, including the count for September. The vast majority of the alleged wagers upon which the tax was not paid were taken during the months of October and November (upon which wagers the tax was not due until after the defendants' arrests), the business having only started in mid-September. In addition, the Court instructed the jury that it could consider a defendant's guilt on any one count in determining his intent with respect to any other count (D. A. 1490), thus the proof as to October and November was considered by the jury in deciding the September count.

2. As to whether the Court "conducted a searching and full examination of the veniremen" (Br. Op. 10-12) concerning the newspaper publicity (D. A. 115-211), depends upon what one considers necessary for a fair trial. If, as the Government states, all that is important is "the attitude of the jurors" (Br. Op. 12, note 6), it is true that the Court exacted a promise from each venireman that he would not consider the newspaper information (D. A. 116, 118, 121, 123, 124, 126, 128, 130, 136, 149, 152, 153, 155,

157, 161, 163, 167, 169, 178).[1] We read **Marshall** to mean more than that. For such a promise does not insure a fair trial. Nor do we fear that jury trials cannot be maintained if this Court requires standards by which an accused may be safely tried. Indeed, we believe, such requirement will stop most prejudicial publicity.

3. The Government's argument (Br. Op. 14) shows on its face that the Court did not require in its instructions that the jury find that mere employees (permitted to be convicted as aiders and abettors) knew that the principals were not paying the tax, contrary to **Ingram**. The Government notes that the "trial judge specifically instructed the jury that if any defendant was not a partner and was 'merely an employee of the alleged partnership * * * you must acquit such defendant of all Five (5) Counts of the Indictment; providing such employee was not an aider or abettor as defined in Instruction No. 41' (Instruction No. 36, A. 1543-1544). He also instructed that any defendant who did not have knowledge of the wagering tax law requirements should be acquitted (A. 1545-1546)." But the Court did not instruct that mere employees must know that their employers were not paying the tax.

4. If books of account and bank records are instrumentalities of tax evasion, as the Government contends (Br. Op. 16), the Fourth Amendment has been whittled away to naught and such decisions as **Harris v. United States**, 331 U. S. 145, no longer have any vitality. For all such books and records are now "closely related" to the subject of taxation.

5. We do not regard our contention that the defendants were improperly sentenced under Count V as "frivolous"

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[1] But the knowledge of the jurors was not elicited, and indeed avoided (D. A. 127, 131).

(Br. Op. 16). The Government notes that Section 7203 contains the word "willfully" while Section 7272 does not, but it ignores the fact that Section 7203 makes no reference to failure to register, while Section 7272 specifically applies to failure to register, the conduct with which the defendants were charged. Apparently Congress chose to penalize all failures to register before beginning business alike, thus not burdening the Government with proof of knowledge of the requirement. Certainly the Government cannot write the offense into Section 7203, which deals only with taxes and returns.

For the reasons stated in the petition and herein, we submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

MORRIS A. SHENKER,

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St. Louis 2, Missouri,
Attorneys for Petitioners.

No. 379.

IN THE

SUPREME COURT OF THE UNITED STATES.

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

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No. 379.

IN THE

SUPREME COURT OF THE UNITED STATES.

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

Petitioners pray that this Court grant them a rehearing of its decision of November 13, 1961, denying their petition for a writ of certiorari for the following reasons:

REASONS FOR GRANTING A REHEARING.

1. The Second Circuit in the recent decision of **U. S. v. Vita,** 294 F. 2d 524, 527, decided August 28, 1961, interprets **Marshal v. U. S.,** 360 U. S. 310, 79 S. Ct. 1171, as requiring that any juror be removed if he has read prejudicial newspaper publicity. In the instant case practically the entire panel had read publicity about the case. Much of the publicity was highly prejudicial, reciting prior convictions, etc. of the defendants. Since no separate or indi-

vidual examination of the jurors was made, the Court avoided eliciting their knowledge, but practically all of them had read articles.

2. We did not present in our petition for a writ of certiorari the following two substantial grounds available to petitioners:

A. The petitioners were charged in each count of the indictment with evading a tax imposed on a partnership consisting of the eight defendants. The District Court, over objection (D. A. 1448-1450; 1559-1561; 1570) charged the jury in Instruction No. 35 that it could convict the defendants if they found the partnership to consist of two or more defendants (D. A. 1540-1543). This was a variance from the indictment. **Stirone v. U. S.**, 361 U. S. 212.

B. The Government called nine witnesses whom it knew would refuse to testify on the ground of self-incrimination (D. A. 878, 885, 898, 932, 934-935, 946-948, 951-952, 957, 963-964, 966, 997-999, 1000, 1025-1027). This prejudiced the defendants in the eyes of the jury, since it was shown that these witnesses had dealt with the defendants (D. A. 1212-1217, 1220-1223, 1227, 1283-1284). Cf. **Grunewald v. U. S.**, 353 U. S. 391.

CONCLUSION.

For the reasons set forth above it is respectfully urged that a rehearing be granted.

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Attorneys for Petitioners.

We hereby certify that this petition is presented in good faith and not for delay and is restricted to substantial grounds arising from intervening circumstances or not previously presented in the petition for a writ of certiorari.

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FILED
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 378

LEO SHAFFER, JULES HORWICK and
EDGAR M. WYATT,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 378

LEO SHAFFER, JULES HORWICK and EDGAR M. WYATT,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Leo Shaffer, Jules Horwick and Edgar M. Wyatt, respectfully request a hearing in this cause, which was decided on November 13, 1961, by an order denying Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Under Rule 58(1) of the Rules of this Court the petition for rehearing in this cause was due to be filed not later

than December 8, 1961, but on application of the attorneys for Petitioners the time for filing the said petition was extended to December 18, 1961 by an order of Mr. Justice Tom C. Clark, entered December 7, 1961.

The petitioners surrendered in open Court on November 27, 1961 before the Honorable Cale J. Holder, Judge of the United States District Court of Indiana and are presently serving the sentence imposed on them in the Federal Institution at Terre Haute, Indiana.

A CIRCUMSTANCE OF SUBSTANTIAL OR CONTROLLING EFFECT HAS INTERVENED SINCE THE FILING OF THE PETITION FOR A WRIT OF CERTIORARI.

Shortly after the Petition for a Writ of Certiorari was denied a decision of the Court of Appeals for the Second Circuit became available to Counsel for Petitioners. This Second Circuit case, *United States* v. *Vita, et al*, 294 F. 2d 524, is in conflict with the decision of the Seventh Circuit in this case, in the application and interpretation of *Marshall* v. *United States*, 360 U.S. 310.

The *Vita* decision was made by the Second Circuit on August 28, 1961, but was not reported in the Federal Reporter, Second Series, until November 6, 1961, and hence was unavailable to counsel until after the latter date.

The Marshall Rule in the Second Circuit

In *United States* v. *Vita, supra*, Carmel and Vita were convicted in the District Court for the Eastern District of New York of bank robbery, endangering lives by use of dangerous weapons while robbing the bank, and conspiracy to commit the robbery. The convictions were appealed on several points, the pertinent one of which was

the trial court's handling of jury exposure to prejudicial newspaper coverage.

On the second day of trial, two Long Island newspapers published articles concerning the case.

> "One of the articles was published in 'Newsday' and contained information concerning Carmel's conviction for bank robbery in Miami, Florida. The other account was in the 'Long Island Daily Press' and made no references to any convictions." (Opinion, *United States* v. *Vita*, 294 F. 2d at 527)

After Carmel's counsel called the judge's attention to the articles, the judge asked the jury whether any had read them. Two indicated they had. One said he had read the "Newsday" article only; the other said he had read only the article in the "Long Island Daily Press."

Both jurors denied communicating the articles' contents to their fellow jurors. Both stated they could judge the case fairly despite having read the articles.

The trial judge held that the "Daily Press" story was "innocuous", that it contained nothing improper or inadmissible, that it could not have influenced the juror who had read it. He allowed the juror to remain.

The other juror who had read "Newsday" was excused, and an alternate was substituted.

In reviewing this phase of the case, Chief Judge Lumbard approved the trial judge's removal of the juror who had read "Newsday" as being required by the *Marshall* decision, in these words:

> "In light of *Marshall* v. *United States*, 1959, 360 U.S. 310, *the substitution of an alternate juror was necessary since the 'Newsday' account contained prejudicial information.* But we agree with the dis-

> trict judge that the story in the 'Long Island Daily Press' could not have prejudiced the defendant since it contained no inadmissible or improper matter." (Emphasis added.) (*United States* v. *Vita*, 294 F.2d 524).

By distinguishing between the two articles and the two jurors as it did in the *Vita* case, the Second Circuit has unmistakably demonstrated its understanding of the Marshall Rule. If a juror admits he has read an article (or heard a newscast) containing prejudicial information, he must be immediately excused. Even if the juror tells the trial judge "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against the [defendant] as a result of the articles," he must be excused. (The quoted language is from this Court's resume' of the facts in *United States* v. *Marshall*, 360 U.S. at 312.)

The Marshall Rule in the Seventh Circuit

The meaning of *Marshall* v. *United States* in the Seventh Circuit is completely different from its meaning in the Second, although the *Marshall* decision was rendered by this Court:

> "[i]n the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts . . ."

This Court's plain object was a uniform rule to achieve equal justice in all federal courts.

But in petitioners' case, the Seventh Circuit approved a result that would have been reversed in the Second Circuit, and, we believe, by this Court.

> "There is no question but what the material circulated through the press and other communication media contained statements prejudicial to the defend-

> ants, characterizing some as professional gamblers, others as ex-convicts, and containing representations of prior criminal activities and convictions." *United States* v. *Shaffer*, 291 F.2d 689, 694.

The Court of Appeals conceded that the articles about petitioners were prejudicial.

Nine of the twelve jury-members admitted being exposed to newspaper articles and television newscasts on the day preceding the trial. (Petition No. 379, p. 10) As in the *Vita* case, each stated he had formed no opinion of defendants' guilt because of the prejudicial news coverage, and each stated he could decide the case only on the evidence presented.

Yet, the trial court refused to grant the continuance or the change of venue requested by the petitioners. The Seventh Circuit found no error in this, in allowing jurors to judge defendants in the Seventh Circuit who would be disqualified as jurors in the Second Circuit. Justice Castle held that the Marshall Rule did not apply because the trial judge offered the petitioners "unlimited additional peremptory challenges." Judge Castle further implies that the offer was to cure the poison of the publicity. *But nowhere in the trial record can it be found that the trial judge offered either "unlimited" peremptory challenges or offered them to eliminate jurors who had read or listened to prejudicial news accounts.* See Petition, No. 379, pp. 11-13.

Petitioners had found that almost the entire panel was exposed to the publicity and knew that no fair jury could be obtained from that panel, at that time, in that place. They had therefore challenged *for cause* the panel and each juror who had read or heard the prejudicial publicity. They also made the motions to continue and to change venue. Counsel could do no more.

The Seventh Circuit seized this unusual and ambiguous offer of the trial judge to support an affirmance of an abuse of discretion by the trial judge that flies in the face of the Marshall Rule. The only line of *Marshall* v. *United States* to which that Court of Appeals paid any heed was the generality that the trial judge has a "large discretion" in this area. It read no further.

The trial judge has "large discretion" but once he realizes prejudice exists, he must act effectively to neutralize it. He cannot offer the defendants a useless remedy —as the judge did here—and contend he has protected them. He must deal effectively. In this case only a continuance or a change of venue would really have sufficed. This Court in *Krulewitch* v. *United States*, 336 U.S. 440, 453, indicated that the trial judge *must conscientiously do all he can* to protect the defendants from publicity prejudice. This Court does not ask defendants to employ a remedy that is useless. *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 913. But the Seventh Circuit says that *Marshall* v. *United States* does not apply to petitioners because the trial judge offered them a useless remedy.

As a result petitioners were tried by a jury of conceded prejudice. The Court of Appeals explicitly stated that the newspaper and television material was "prejudicial". By what means could it prejudice petitioners except through the jury? Yet the Court of Appeals found no need to apply the *Marshall* decision because the petitioners did not use challenges offered to them ambiguously and offhand and under circumstances—since virtually the whole panel was infected—in which their utilization would be nugatory. Only a continuance or a change of venue could really have protected petitioners.

United States v. *Vita* and *United States* v. *Shaffer* meet head on. Only this Court can resolve the conflict and carry out its purpose of providing a proper and uniform rule.*

THE GOVERNMENT FAILED TO PROVE THAT THE PETITIONERS ATTEMPTED TO DEFEAT THE TEN PERCENT EXCISE TAX AND FAILING TO PAY SAID TAX.

The foregoing presents substantial grounds available to petitioners which were not previously presented. (See Rule 58(2) of the Rules of the Supreme Court of the United States.)

Counts 2, 3, and 4 charged the petitioners did willfully attempt to evade and defeat the ten percent excise tax on wagers by failing to make Form 730, the wagering excise return to the District Director of Internal Revenue for the District of Indiana; and "by failing to pay to the said District Director of Internal Revenue . . . the said wagering tax due and owing"; and by doing certain acts, to-wit: concealing the wagering business, concealing the identities of the copartners, maintaining incorrect books of the amount of wagers received by the defendants, causing to be destroyed memoranda and wagering slips which would

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* 1. Trial in Petitioners' case began on June 22 and the judge questioned jurors about reading the June 21 newspaper articles. Some jurors had been selected in May and were warned not to read the papers about the case. When the trial judge encountered Juror Bain who had been so warned and found that Bain had been reading the papers, the judge excused him *for cause* (D.A. 165). This is somewhat ambiguous in view of the fact he did not excuse other jurors apparently simply because they hadn't been told not to read the papers.

2. The judge's questions to the jury seemed designed to obtain favorable answers.

indicate the identities of persons placing wagers with the defendants and the gross amount of such wagers, for the months of September, October and November, respectively. (Deft's App. 23-28).

Count 1 charged a conspiracy to commit the foregoing acts plus conspiracy to engage in the business of accepting wagers without paying the special tax imposed by Section 4411 of the Internal Revenue Code and failing to register with the District Director as required by Section 4412 of the Code.

Section 1, Title 18 U.S.C. defines a felony as any offense punishable by imprisonment for a term exceeding one year. Any other offense is a misdemeanor.

Section 7201, Title 26 U.S.C. provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Section 7203, Title 18 U.S.C. provides:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . . keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than one year, or both, together with the costs of prosecution."

Section 371, Title 18 U.S.C. punishes the crime of conspiracy with imprisonment not exceeding five years, but if the offense which is the object of the conspiracy, is a misdemeanor only, the punishment shall not exceed the maximum punishment provided for such misdemeanor.

The Government failed to prove, beyond a reasonable doubt, that the failure to pay the excise tax was a willful attempt to defeat and evade the ten percent excise tax levied on wager. Count 2 charged that the defendants named therein, including the petitioners, accepted wagers during September 1957 in the amount of $326,315.20 upon which a ten percent excise tax was due in the sum of $32,631.52 (Deft. App. 23). Count 3 alleged that the defendants accepted wagers during October 1957 amounting to $1,305,260.80 upon which the excise tax due was $130,526.08 (Deft. App. 25). Count 4 stated that the defendants accepted wagers in November 1957 totalling $1,631,576.00; the excise tax due thereon was $163,157.60 (Deft. App. 26-27).

The total tax imposed, therefore, is $326,315.20. It is conceded that this total excise tax was not paid. The question is whether the failure to pay this tax is a violation of Section 7201, Title 26, which defines a felony or of Section 7203, Title 26, which defines a misdemeanor, or whether there was an absolute inability to pay the tax so as to justify a verdict of not guilty.

An examination of the testimony of the Government "bettor" witnesses does not disclose a single instance where the excise tax was passed on to the bettor, nor did the Government introduce any proof whatever that the excise tax was collected from any bettor. There wasn't a scintilla of testimony or evidence introduced by the Government that the defendants had sufficient money or other assets with which to pay the tax. In order to raise the

failure to pay the tax to the degree of felony it was incumbent upon the Government to prove beyond a reasonable doubt that the defendants were able to pay the tax but refused or willfully failed to do so. *Spies* v. *United States* (1943), 317 U.S. 492. This case points out (p. 493):

> "Section 145(a) makes, among other things to pay a tax or make a return by one *having petitioner's income* at the time or times required by law a misdemeanor."* (Emphasis supplied.)

In *United States* v. *Bardin*, 224 F. 2d 255, the Government proved beyond a reasonable doubt that Bardin had funds with which to pay the tax due the Government, or a major part of it, but refused to do so.

We then come to the charges that petitioners attempted to defeat and evade the excise tax by concealing the true and correct amount of wagers accepted by them, keeping books which did not reflect the correct amount of wagers, destroying wagering slips which would indicate the identities of the bettors and the gross amount of wagers.

The Government failed utterly to prove the commission of any of such acts. On the other hand the Government's proof showed the defendants did *not* conceal the true amount of wagers, that they did *not* destroy wagering slips that identified the bettors and the gross amount of wagers.

Government agents searched and seized papers and documents by virtue of a search warrant. (See motions to quash search warrant, Deft. App. 29-33.) The return on the search warrant showed the seizure of "information concerning football games; large lined cards and sheets; miscellaneous business receipts; one book-keep book; *bet-*

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* Now Section 7203, heretofore set forth.

ting slips; football schedules; score cards for football games; betting pads; keys; horse racing sheets" and other property. (Pltf. App. 2182.)

The Government introduced its Exhibit No. 136, wagering slips which were identical as being in the handwriting of defendants, Gordon, Tamer, Horwick, Share, Shaffer and Wyatt showing wagers made with them (Pltf. App. 2225-2228).

The summary of Exhibit 138 showing wagers received by the defendants appears in Volume III of Pltf. App. on an unnumbered page, fourth page from the end of the volume.

Government witness Glen Johnson testified from records obtained by him at 671½ Wabash Avenue, the premises occupied by the defendants, on November 29, 1957; from those records he was able to determine the total amount of wagers accepted by the defendants. His testimony indicated a large amount of the wagers were amounts receivable or due the defendants. He was able to testify to the total amounts of wagers *accepted* by the defendants from their records seized on November 29, 1957, from which the excise tax was computed. (Deft. App. 1289-1333)

Handwriting experts Doulder and Schroeder, Government witnesses, were able to identify the handwriting of the defendants on the *wagering tickets.* (See Petition No. 378, page 12.)

It thus appears that the petitioners did not attempt to defeat and evade the said excise tax or the payment thereof by any of the means or acts alleged in the indictment and that the verdicts of guilty on Counts 1, 2, 3 and 4 of the indictment and the sentences imposed thereon were erroneous.

Wherefore, Petitioners pray that a rehearing may be granted to the end that the order denying the Petition for a Writ of Certiorari may be set aside and the said Petition be granted.

Respectfully submitted,

Leo Shaffer, Jules Horwick and
Edgar M. Wyatt, *Petitioners*

By Richard E. Gorman and
Myer H. Gladstone,
Their Attorneys.

NO. 378

LEO SHAFFER, JULES HORWICK AND EDGAR M. WYATT,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

MYER H. GLADSTONE does hereby certify that he is one of the attorneys for the petitioners and does further certify that the petition for rehearing filed in this cause is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2) of the Rules of the Supreme Court, to-wit: to intervening circumstances of substantial or controlling effect and to a substantial ground available to petitioners though not previously presented.

The petitioners have been surrendered on November 27, 1961, and are presently confined in the United States Institution at Terre Haute, Indiana.

.....

MYER H. GLADSTONE